



**Kwendo v Attorney General & another (Civil Appeal 11 of 2019)
[2024] KEHC 1530 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 11 OF 2019
PJO OTIENO, J
FEBRUARY 16, 2024**

BETWEEN

JACKLYNE SARAH KWENDO APPELLANT

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

RENTWORKS EAST AFRICA LIMITED 2ND RESPONDENT

*(Being an appeal against the Judgment and Decree of Hon. E. Malesi (SRM)
in Kakamega Civil Case No. 158 of 2017 delivered on 15th January, 2019)*

JUDGMENT

Case Background

1. The genesis of this appeal is traceable to an alleged road traffic accident that is pleaded to have occurred on 12th December, 2015. The Plaintiff presents that on the incident day, she had boarded motorcycle registration number KMDG 009C as a pillion passenger when the first and second defendant agent/servant, employee/driver carelessly and negligently controlled moot vehicle registration number GKB 208H by failing to stop at Jamindas junction leading it to violently knock the motorcycle causing the Plaintiff several injuries and also suffered loss and damages which she holds the defendant wholly liable. The Plaintiff set out the particulars of negligence as well as particulars of special damages and prayed that the Defendants be found liable to him for damages, costs and interests.
2. A default Judgment was entered against both Defendants. The 2nd Defendant successfully sought its setting aside but the 1st Defendant did not. The 2nd Defendant resisted the claim, denied the allegations of negligence and on a without prejudice basis pleaded that if any accident occurred as alleged that the same was solely or substantially occasioned by the negligence of the motorcycle rider. That defence notwithstanding, the parties agreed on liability and recorded the same at 70:30 in favour of the Plaintiff.



3. This appeal thus is purely on the question of quantum of damages and challenges the Judgment for failure to award special damages including future medical costs and for failure to consider the submissions offered by the Appellant.

Analysis and Determination

4. This being a first appeal, this Court will re-appraise and re-examine the entire evidence led before the trial Court, and the decision therefrom, afresh, and by way of rehearing and with a view to coming to own conclusions. See *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR.
5. Having adequately considered all the relevant circumstances of the case, I find the contentious issues for determination to be; a) whether the quantum of special damages, including future medical costs as awarded by the trial Court was inordinately low and is thus subject to disturbance. The Court consider that to be the only issue for determination because even though the Appellant has introduced a ground challenging the assessment of costs, the issue is not due for consideration because submissions are never pleadings. Pleadings on appeal is found in the Memorandum of Appeal and not upon Submissions.
6. On award of damages, it is trite that an appellate court should be slow in interfering with the discretion of the trial court on award of damages unless it is revealed that the trial Court acted on wrong principles of the law or took into account irrelevant factors thus awarding so inordinately low/high erroneous estimate of the damages that such awards will be disturbed as was issued in Eastern Africa Court of Appeal in the case of *Kanga v Manyoka* (1961).
7. The Appellant herein faults the trial Magistrate for failing to award special damages as was pleaded and proved. On special damages, the Court is bound by the decision in *Hahn v Singh* [1983] eKLR where the Court reiterated the trite position of the law that special damages must be specifically pleaded and strictly proved before they can be awarded. The rationale is that, special damages are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves but proof by production of actual receipts is usually the surest and best mode of proof but not the only way.
8. Special damages pleaded in the Plaint dated 9.8.2018 was: -
 - i) Special damages Kshs. 82,987 (not accurate total)
 - ii) Future medical expenses Kshs. 3,000 x 38 years x 12 months = 1,369,000The special damages claimed included Kshs. 55,000 paid to Dr. Lamba to prepare the medical report and fill the P3 form (a receipt of Kshs. 6,000 was exhibited on the same), Kshs. 5,000 paid for demand notice, medical expenses at a cost of Kshs. 42,432.
9. The trial Court in expressing itself specifically regarding the Kshs. 55,000 for doctor's fee for medical report and completion of the P3 form, held that evidence that had been adduced appeared unreasonably exaggerated and hence scaled it to Kshs. 10,000.
10. This Court's duty is to determine whether the trial Court acted on the right principle of law by scaling down the pleaded Kshs. 55,000 of doctor's fee as well as acquisition of the P3 form to Kshs. 10,000.
11. There is evidence that the Appellant produced receipts indicating payment of Kshs. 55,000 as the doctor's fee for medical report and P3 form. The Medical Practitioners and Dentist Rule, Legal Notice No. 131, enacted under the *Medical Practitioners and Dentists Act* prescribes that medical and dental reports can be charged at a minimum of Kshs. 6,000 and a maximum of Kshs. 60,000. A court of



law determines disputes based on the evidence adduced by the parties. When the doctor was cross-examined, he was never shaken on his charge for Kshs. 55,000. The Court finds that, that evidence stood uncontroverted and it was not open for the trial Court to discount it to an arbitrary figure not pleaded, not prayed for. The Court finds that the sum of Kshs. 55,000 was proved to have been paid to the doctor. The same qualifies as special damages. To that extent the decision reducing that sum to Kshs. 10,000 is set aside.

12. On the other heads of special damages pleaded to be motor vehicle search and medical expenses and costs of a demand letter, the Court finds that motor vehicle search and medical expenses were not only pleaded with particularity but also proved strictly. The same are awarded as pleaded. The Court however finds that demand letter is a claim for legal fees that is awardable at taxation not in the suit as special damages. That sum is disallowed but the Court awards the other three heads giving an aggregate total of Kshs. 98,082/= for special damages in terms of paragraph 8 of the Plaint.
13. On the Appellant's faults against the trial Magistrate for failing to award future medical costs as pleaded, the Court rules that, that head of damages was indeed pleaded but no evidence was led on it. In its Judgment, the trial Court found that costs of future medical expenses were not pleaded and disallowed same.
14. The Court notes from the proceedings that Dr. Lamba, called as PW3, gave evidence and produced only receipts for the medical report but not the report itself. That report initially identified by the appellant was thus never produced and was thus not an exhibit in the file. For that failure, while there was a pleading for future medical expenses, there was no evidence tendered on it. Without evidence, the claim was not proved and the trial Court was entitled to dismiss the claim as it did. It matters not that the doctor took the firm view on the medical report that the appellant would require lifelong medication at a disclosed cost. It is enough that the disclosed costs were excluded from the evidence when the report was not produced. The Court finds no fault on the trial Court and holds that future medical expense pleaded, and not prayed for was never proved.
15. The Court allows the appeal to the limited extent that the sum awarded for special damages in the sum of Kshs. 57,982 is set aside and on its place substituted a sum of Kshs. 98,052/=. To that limited extent the appeal succeeds.
16. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 16TH DAY OF FEBRUARY 2024.

PATRICK J. O. OTIENO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

No appearance for parties

Court Assistant: Polycap Mukabwa

