



**Gachuthi v Karanja & another (Civil Appeal E067 of 2022)  
[2024] KEHC 10066 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 10066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E067 OF 2022  
SN MUTUKU, J  
JUNE 19, 2024**

**BETWEEN**

**PAUL KAGECHE GACHUTHI ..... APPELLANT**

**AND**

**JANE KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER MAINA KARANJA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from part of the judgement of the Honourable  
G.M Simatwo, Resident Magistrate, delivered on 19th August 2022)*

**JUDGMENT**

1. The Appellant, through a Memorandum of Appeal dated 30<sup>th</sup> August 2022, has moved this court on appeal from the judgment of Hon. G.M Simatwo (R.M) at Ngong Chief Magistrate’s Court delivered on 19<sup>th</sup> August 2022. He has raised the following grounds of appeal:
  - i. That the Learned trial Magistrate erred in law and fact for failing to award the Appellant general damages despite finding the Respondents 100% liable for the accident and injuries occasioned to the Appellant.
  - ii. That the Learned trial Magistrate erred in ruling that omission to plead the injuries suffered was fatal despite the uncontested medical reports’ confirmation of the injuries suffered by the Appellant.
  - iii. That the Learned trial Magistrate erred in not appreciating future complications despite the Appellant’s apparent incapacitation.
  - iv. That the Learned Magistrate erred in overlooking medical reports despite there being no opposition from the Respondents.



- v. That the Learned Magistrate misdirected herself in law and facts in not relying on uncontested evidence thereby causing a miscarriage of justice.
  - vi. That the Learned trial Magistrate erred in law and fact in failing to award general damages for loss of future earnings and loss of earning capacity against the weight of evidence.
  - vii. That the Learned trial Magistrate erred in law and fact in holding that the Appellant had not wholly proved his claim for special damages contrary to the evidence on record.
  - viii. That the Learned trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and considering submissions and authorities relied upon by counsel for both parties thereby arriving at wrong conclusions.
  - ix. That the conclusion of the Learned Magistrate on evidence was improper and therefore raises need to be interfered with by this court.
  - x. That the Learned Magistrate erred in her appreciation of the law applicable and the evidence adduced in supporting the Appellant in the circumstances of the case.
2. The Appellant prayed that the appeal be allowed, and judgement of quantum be set aside. That this court be pleased to re-assess and re-evaluate the entire evidence on record and arrive at its own independent conclusion; that this court enters judgement for the Appellant against the Respondents on quantum and costs of the appeal be provided for.
  3. The Appeal was canvassed through written submissions.

#### **Appellant's submissions**

4. The Appellant has raised three issues in his submissions dated 3<sup>rd</sup> November 2023 as follows:
  - i. Whether the Learned trial Magistrate erred in law and in fact in failing to award general damages for pain and suffering and loss of amenities in its entirety despite the evidentiary facts provided by the appellant herein.
  - ii. Whether the learned magistrate erred in law and in fact in failing to award damages for loss of earning capacity and future medical expenses against the weight of evidence on record.
  - iii. Whether the Learned magistrate erred in law and in fact in holding that the Appellant had not wholly proven his claim for special damages contrary to evidence on record.
5. On the first issue the Appellant submitted that an appellate court could interfere with the discretion of the trial court if it can be shown that the award was achieved through wrong principles or misapprehension of evidence. He relied on the Court of Appeal decision in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* [2013] eKLR, where the Court in relying on *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – vs- A.M.M Lubia and Another* [1982 -88]1 KAR 777, stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa 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. See *Ilanga v Manyoka*, [1961] EA 705,



709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419.”

6. He submitted that the trial court erred in misapprehending evidence in totality in the award of general damages by finding that the omission to plead the injuries suffered was fatal to the Appellant’s case and failing to award general damages on that basis. He submitted that he pleaded the injuries under paragraph 8 of the Plaintiff that the Plaintiff suffered injuries that led to loss of blood, bodily pain, suffering and loss of amenities. He argued further that he produced evidence of the injuries sustained by tendering exhibits which was not contested. That he also testified about the nature of the injuries suffered.
7. He submitted that although the particulars of injuries in the Plaintiff were insufficient the extent of the injuries suffered were brought out in evidence before the trial court. He relied on Denshire Muteti Wambua case cited above and Caroline Chepkemai Chelule -vs- John Kung’u & Another [2022] eKLR.
8. He submitted that, at all times, the Respondent was aware of the injuries suffered by the Appellant and hence was able to defend the suit. That failure to plead the particulars of injuries suffered was curable by submissions. He relied on David Githuu Kuria -vs- Equity Bank Kenya Limited and 2 others [2019] eKLR.
9. The Appellant submitted that the case of Boniface Kinyua Kathuri -vs- David Munyoki [2020] eKLR relied on by the trial court was not applicable in this case because in that case, the appellant had pleaded one set of injuries and proceeded to prove a different set of injuries which the appellate court held was not tenable. He submitted that in this case the injuries sustained were set out in the P3 form and the medical report and was therefore clear to the Respondents what injuries the Plaintiff had suffered. It was his case, therefore, that the trial court applied the wrong principles in failing to award general damages and as a result this court ought to interfere with the trial court’s decision.
10. The Appellant urged this court to rely on authorities on comparable injuries to arrive at an appropriate award. He relied on the Court of Appeal decision in Stanley Maore -vs- Geoffrey Mwenda [2004] eKLR, where the court stated thus:

“ ..... Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
11. He submitted that the principle in suits for bodily injuries in measure of damages is governed by the principle of restitutio in integrum (an award for bodily injuries is intended to be compensatory in nature such that the Plaintiff should receive in monetary terms no more and no less than his actual loss) as was endorsed in West(H) & Son Ltd. -vs- Shepherd (1964) A.C 326; that the medical report by Dr. Isaac Kingori showed that the Appellant sustained a left closed diaphyseal femur fracture with comminution as well as mild lung contusion; that he was initially immobilized with a back slab and skeletal traction and that he underwent intramedullary nailing of the left femur.
12. On the second issue, the Appellant submitted that he is entitled to loss of earning capacity as this claim is in the nature of general damages and need not be pleaded; that loss of earning capacity is awarded for the risk that the disability has exposed the claimant to either losing his job or in case he loses the job and his diminution of chances of getting an alternative job. He relied on Butler -vs- Butler [1984] KLR 225 at 232 where the Court stated that loss of earning capacity is a different head of damages from an



actual loss of future earnings which can readily be proved at the time of the trial. This difference was explained as follows:

“... compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

13. The Appellant also relied on the Court of Appeal case of Mumias Sugar Company Limited -vs – Francis Wanalo [2007] eKLR and submitted that according to the medical report, he was immobilized which meant that he could not carry out his normal activities and that he also testified to have lost his job at a hotel and that he was not able to provide for his family. He submitted that he is entitled to an award under this head and though he did not tender any evidence of his actual earnings, he urged this court to use the minimum monthly wages as per Regulation of Wages Order 2018 which set out the monthly wage at Kshs. 13, 572.90/-. He submitted that according to the case of Board of Governors Ongata Academy – vs- Gabriel Ngaiyaiya Rumoi [2021] eKLR, the calculation of period of loss of earnings is from the date of the accident to the date of judgement and that an award of Kshs. 249,200.45 would be sufficient, calculated from the period between the accident and judgement, multiplied by the minimum wage.
14. He submitted that the trial court failed to award him future medical expenses stating that this had to be specifically pleaded and proven; that he testified that he was still undergoing medical check-ups twice a year where he is charged Kshs. 6,050 per consultation; that he sought a multiplicand of 10 as biannual review for the next 5 years and therefore arrived at Kshs 60,500/-. He further submitted that the approximate cost of removal of the metal plate is Kshs. 300,000/ and that he therefore seeks a total of Kshs. 360,500 as the award under this limb.
15. He submitted that this issue was not pleaded and was left for determination by the trial court as it was set out during the hearing. He relied on Court of Appeal case of Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates -vs- Salama Beach Hotel Limited & 3 others [2017] eKLR.
16. On the third issue he submitted that the learned magistrate did not explain how she arrived at the figure of Kshs. 200,178 under medical expenses; that although invoices are not proof of payment, one of his invoices should have been considered as the same had been endorsed with the word ‘paid’ and that the same should have been considered as a receipt. He submitted that he ought to have been awarded Kshs15,000/- as special damages as provided on the guarantee form dated 17<sup>th</sup> March, 2021 as the same has an mpesa transaction code and has the word “paid.” He relied on the case of Total Kenya Ltd formerly Caltex Oil (K) Ltd -vs- Janevams Ltd (2015) eKLR where the court stated in the case of Great Lakes Transport Co(U) Ltd -vs- Kenya Revenue Authority (2000) eKLR where it was held that:

“What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word “paid” on the invoices and that would turn the status of the invoice into a receipt...”
17. He submitted that he is entitled to an award of Kshs. 217,168/- as opposed to Kshs. 200,178 awarded by the trial court. He further submitted that the motorcycle repairs totaled to Kshs. 40,350 as in the valuation report; that the trial magistrate did not award an amount of Kshs 5,000 as paid to the police officers for attending court for hearing despite the evidence adduced. According to him the total amount to be awarded for quantum is Kshs. 1,734,700.45, calculated as follows:

- i. General damages Kshs1,100,000



- ii. Loss of earning capacity Kshs 249,200.45
- iii. Future medical expenses Kshs 360,500
- iv. Special damages deficit Kshs25,990

### **Respondent's submissions**

18. The Respondents' submissions are dated 6<sup>th</sup> December, 2023. On the issue of general damages for pain and suffering the Respondent submitted that parties are bound by their pleadings and that the contents of the Plaint rightfully bind the plaintiff unless amended. The Respondent relied on the Court of Appeal case of Independent Electoral and Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 others [2014] eKLR and Boniface Kinyua Kathuri – vs- David Munyoki [2020] eKLR.
19. They submitted that the Plaintiff vide a Plaint dated 16<sup>th</sup> August 2021 did not plead particulars of injuries; that the specific injuries were not pleaded and particularized and therefore the trial court was right in declining to award under this head. They relied on Treadsetters Tyres Ltd – vs- John Wekesa Wepukhulu [2010] eKLR, where it was held that:
- “I have carefully considered the above. First, however much, the courts are Courts of Equity, there are certain procedural law that cannot be overridden by principles of equity. Each party is bound by his pleadings. In cases of tortuous claims based on negligence, injuries and special damages must be pleaded. They cannot be imagined or inferred. The court's road-map are the pleadings on record. If a party alleges he suffered an injury, he must particularize the same so that the Defendant can specifically respond to the claim. One must plead the nature and extent of injuries suffers. This is a mandatory requirement of the law. His omission cannot be cured by principle of equity or the principles envisaged in Section 1A, 1B and 3A of the Civil Procedure Rules.”
20. It was the Respondent's case that it is not enough for the Plaintiff to infer the particulars of injuries from documentary evidence and testimony because the Court's Road map is the pleadings and not documents. That one can only prove what is contained in the pleadings. They relied on the Supreme Court case of Raila Amollo Odinga & Another- vs- IEBC & 2 others[2017]eKLR, where it stated that :
- “In the absence of pleadings, evidence if any, produced by parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them.”
21. They submitted on a without prejudice basis that should the court award under this head, an amount of Kshs. 350,000/- would be adequate. They relied on the case of Reamic Investment -vs – Joaz Amenity Samuel [2021] eKLR.
22. On future medical expenses, they submitted that the same should not be awarded as it is a special damage claim which ought to be pleaded in the plaint which in this case has not been done. They relied on the case of Fairmile School Limited & Charles Musalima -vs- Lucy W. Njoroge [2019]eKLR



where the court cited the Court of Appeal case in *Tracom Limited & Another -vs- Hassan Mohammed Adan*[2009] eKLR, where court held thus:

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated:

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded.”

23. On loss of earning capacity, they submitted that this ought to fail as the particulars of injuries that led to this were not pleaded. They reiterated that parties are bound by their pleadings. Again, on without prejudice basis, they submitted that should this court be inclined to award under this head, the same should not be granted. It is their case that the medical report from Kijabe Hospital did not indicate whether the Plaintiff sustained any incapacitation.

#### **Analysis and determination**

24. This being the first appellate court, it is my duty to reconsider the evidence, evaluate it and draw my own conclusions, always bearing in mind that I did not observe the witnesses as they testified and should give allowance for that. I have accordingly read the record of the trial court, the grounds of appeal, the record of appeal, the submissions of the parties and authorities cited. I note that the Appellant has raised 10 grounds of appeal out of which three issues have been identified for determination. I will adopt the issues identified by the Appellant as the issues that require my intervention and determination in this Appeal.

#### **Whether the Learned trial Magistrate erred in law and in fact in failing to award general damages for pain and suffering and loss of amenities in its entirety despite the evidentiary facts provided by the appellant herein.**

25. The trial court agreed with the Respondents that the Appellant did not specifically plead the injuries he had suffered. Relying on *Boniface Kinyua Kathuri v. David Munyoki* case, the trial court found that the Appellant had failed to plead the nature of the injuries sustained and declined to award general damages for pain, suffering and loss of amenities. She found the failure to plead injuries suffered to be fatal to Appellant’s case.
26. The record of the trial court shows that the court found the Respondents fully liable for the accident. Indeed, the court records show that the 2<sup>nd</sup> Respondent pleaded guilty and was fined Kshs 30,000 for the traffic offence giving rise to the civil suit. I have read the authorities relied on by the Respondents in advancing the view that parties are bound by their pleadings. I agree with them on this principle of law.
27. I have read the Plaintiff filed in the lower court. In Paragraph 8 of the Plaintiff it is stated as follows:

Further, as a sequel to the accident aforesaid the Plaintiff sustained injuries which led to loss of blood, bodily pain, suffering and loss of amenities. The Plaintiff is still undergoing



treatment and as at now his medical expenses stand at Kenya Shillings Four Hundred and Seventeen Thousand and Eight Shillings (Kshs 417,008.00).

28. I have considered this issue. I agree with the principle that parties are bound by their own pleadings. After finding the Respondent fully to blame for the accident, the trial court reasoned as follows in regard to an award of general damages for pain suffering and loss of amenities:

“Regarding general damages, the cardinal principle on award of general damages is that similar injuries should as far as possible attract similar awards.

In his testimony before the court, the Plaintiff indicated that he suffered a broken leg (fracture) necessitating a metal implant to be fixed on the injured leg. The medical report and discharge summary also indicated that the Plaintiff sustained a fracture of the midshaft femur (L). However, as rightly submitted by the Defendants, the Plaintiff never pleaded this injury in his plaint. Instead, the Plaintiff averred under Paragraph 8 of his Plaint that he sustained injuries which led to loss of blood, bodily pain and loss of amenities. The specific injuries sustained were not pleaded at all.”

29. The trial court declined to award general damages and relied on the case of Boniface Kinyua which she said was binding to her. She also declined to award damages for future medical expenses and loss of earning capacity. The record of the evidence adduced in the lower court shows that the Appellant, though he did not plead particulars of injuries in the Plaint, adduced evidence on the injuries he had sustained and tendered in evidence documentary evidence showing that he had been treated for fractured femur among other injuries.

30. It is my view, guided by Denshire Muteti Wambua case, that the trial magistrate was in error. In the above case, the Court of Appeal, faced with an appeal where the Plaintiff did not plead particulars of injuries, stated that:

“.....The court proceeded to assess damages on the erroneous basis that the injuries complained of were only those that featured in the plaint. In arriving at the award of Shs. 100,000/= the learned trial Judge failed to take into account all the evidence adduced which clearly showed that the injuries were more severe and more extensive. Consequently, the assessment of the damages by the learned trial Judge omitted a relevant factor and resulted in an award that was wholly erroneous. We have no hesitation in stating that there is sound basis in this appeal for interfering with the award of general damages.”

31. My view is that the medical documents produced in court were not contested and showed that the Appellant had suffered injuries as shown on those documents. The medical documents produced in evidence were sufficient to guide the trial court to assess general damages. As held by the Court of Appeal in the above cited case, the trial court omitted a relevant factor and resulted in her declining to award general damages which is erroneous.

32. I have considered the authorities relied on by the Appellant on this issue and I find that an award of Kshs 900,000, which I hereby grant, is adequate for general damages for pain and suffering for the reason that the Respondent was found 100% liable.



**Whether the learned magistrate erred in Law and in fact in failing to award damages for loss of earning capacity and future medical expenses against the weight of evidence on record.**

33. I have considered this issue and the rival submissions. Record shows that the Appellant did not plead loss of earning capacity and future medical expenses in his Pleint. He cannot claim what he did not plead at the appellate level.

34. The trial court expressed itself as follows on this issue:

“Whilst the Plaintiff in his oral testimony asked the court to award him future medical expenses of Kshs 300,000 towards removal of the metal implants, he never pleaded this claim in his Pleint and hence I am not in a position to allow the same.”

35. Using the same reasoning, the trial court declined to award loss of earning capacity due to failure by the Appellant to plead the same in the Pleint. I find no reason to disturb the discretion of the trial court on the above issues. It is clear that the Appellant did not plead future medical expenses nor loss of earning capacity. He cannot claim these on appeal.

**Whether the Learned magistrate erred in law and in fact in holding that the Appellant had not wholly proven his claim for special damages contrary to evidence on record.**

36. I have considered this issue. It is trite that special damages ought to be specifically pleaded and proved. In Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held that:

“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.”

37. The trial court stated as follows in respect to special damages:

“The general rule is special damages must be specifically pleaded and strictly proved..... The Plaintiff sought medical expenses of Kshs 417,008 but my scrutiny of the receipts provided as exhibits showed that only a sum of Kshs 200,178 was proved to have been incurred.”

38. To this figure the trial court awarded Kshs 36,530 for motor cycle repairs, giving a total of Kshs 236,707. I have no reasons to disturb this award.

39. Consequently, this appeal succeeds partly in that the Appellant is award damages as follows:

- i. General damages for pain and suffering Kshs 900,000.
- ii. Special damages Kshs 236,708.
- iii. Costs of the suit.
- iv. Interest on (i) (ii) and (iii) at court rates.

40. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> JUNE 2024.**

**S. N. MUTUKU**

**JUDGE**



In the presence of:

1. Mr. Nyarango for the Appellant.
2. Ms Njeri for the Respondent.

