



**Simiyu v Kangethe & another (Civil Appeal E062 of 2021)  
[2024] KEHC 7062 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7062 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E062 OF 2021  
RN NYAKUNDI, J  
JUNE 13, 2024**

**BETWEEN**

**HOSEA NAIRUKA SIMIYU ..... APPELLANT**

**AND**

**CHARLES NJUGUNA KANGETHE ..... 1<sup>ST</sup> RESPONDENT**

**INTERCITY LOGISTICS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Representation:**

Jeremiah Onger Samba & Co. Advocates

Nyairo & Co. Advocates

1. This appeal arises from the judgment and decree in Eldoret CMCC 1082 of 2018. The plaintiff instituted a suit vide a plaint dated 20<sup>th</sup> September 2018 wherein the cause of action was an accident that occurred on 3<sup>rd</sup> March 2016. The plaintiff was riding along the Moi's Bridge Kitale road when the driver of KBT 586W recklessly drove the said motor vehicle resulting in an accident which resulted in the plaintiff sustaining injuries. The plaintiff sought general damages, special damages and costs of the suit.
2. I note that the appeal is against damages only and therefore I shall include the evidence and testimonies relevant to the same.
3. The plaintiff called 7 witnesses whereas the defendant called 1 witness in his defence. Pw1 testified that on the material date when he was from Matunda aboard a motor cycle to Kitale when the accident occurred. After the accident he was treated at Mediheal hospital and he stayed at the hospital from 4<sup>th</sup> march 2016 to 1<sup>st</sup> April 2016 when he was discharged. He was forced to stay at the hospital at a



- cost of Kshs. 4,000/- for 67 days and he had a bill of Kshs. 615,627/-. The outstanding bill was Kshs. 1,164,561 which included extra room charges.
4. Upon conducting a search on the motor vehicle, the same was discovered to belong to the 2<sup>nd</sup> defendant. The plaintiff produced the medical report, the police abstract, motor vehicle search and the abstract as exhibits. He also produced the statutory notice and the demand letter as exhibits. It was his testimony that they produced a title deed for LR No. Waitaluk/mabonde/block 13/188 as security for the hospital bill and he entered into an agreement for the same at a cost of Kshs. 5,000/-. Prior to going to Eldoret he had been treated at Kitale and paid Kshs. 6,500/- for a scan he underwent. He also underwent a brain scan and sought for a total of Kshs. 1,793,688/- plus costs and interests of the suit.
  5. The other relevant witness to the appeal is PW4 who was the plaintiff's uncle. He testified that he produced the title for the release of PW1.
  6. Upon considering the evidence and the testimony of the witnesses and the trial court found the defendants 100% liable and awarded a total of Kshs. 3,566,571/- in general and special damages.
  7. Being aggrieved with the judgement and decree, the appellant instituted the present appeal vide a Memorandum of Appeal dated 12<sup>th</sup> June 2021 premised on the following grounds;
    - i. That the learned trial magistrate erred in law and fact in granting special damages in the sum of Kshs. 1,116,561 instead of the correct and proved sum of Kshs. 1,795,698.00 (leaving out Kshs. 615,627 paid directly to Mediheal Hospital by the Appellant, plus Kshs. 5,000/ = paid for agreement to release the Appellant from hospital, Kshs, 6,500 paid for CT Scan and Kshs. 550/ = paid for a copy of Records to NTSA).
    - ii. That the learned trial Magistrate erred in law and fact in ordering payment of interest on special damages to run from date of judgment.
  8. The parties were directed to prosecute the appeal vide written submissions. The appellant filed submissions through the firm of Messrs. Samba & Company Advocates whereas the respondent filed submissions through the firm of Messrs. Nyairo & Company Advocates.

### **Appellants' case**

9. Learned counsel for the appellant submitted that the Appellant adopted his witness statement dated and signed on 20<sup>th</sup> September 2018 as his evidence at the hearing of the matter in the lower court. Counsel submitted that the relevant part is paragraph 6 of the statement where he stated as follows:-

“The total hospital fees was Kshs. 1,512,188.00. I was only able to raise Kshs. 615,627 leaving a balance of Kshs. 896,561/=. The hospital management did not let me go home because of the balance of their fees. They detained me for another 67 days and charged me Kshs. 4,000/= per day. This increased my bill by Kshs. 268,000/= thus raising my indebtedness to Kshs. 1,164,561.00”.
10. Counsel submitted that simple arithmetic Kshs. 615,627.00 added to Kshs. 1,164,561.00 brings a total of Kshs. 1,780,188.00. Further, that in her judgment the learned trial Magistrate captured the figure of Kshs. 615,672/= which the Appellant had paid to the hospital and clearly stated that the outstanding bill was Kshs. 1,164,561. She confirmed that there was a letter dated 26<sup>th</sup> August 2016 and statement which were later produced as exhibits by Dr. Rono from Mediheal Hospital. He pointed out that at page 144 of the Record of Appeal the trial Magistrate captured the evidence of payment of the following monies:-



- i. Kshs. 550/= to NTSA exhibit 4a & 4b
  - ii. Kshs. 2,000/= to Dr. Njenga exhibit 5
  - iii. Kshs. 5,000/= for agreement exhibit 9
  - iv. Kshs. 6,500/= for CT Scan (receipt) exhibit 10
11. Although the above items whose total was Kshs. 14,050.00 was well captured in the judgment by the Appellant the learned trial Magistrate did not factor them in her final award in the judgement on the head of special damages. She only factored Kshs. 2000/= being Doctor Njenga's fees on the medical report, leaving out Kshs. 12,050/=. Counsel urged that this was an error.
  12. The Appellant's contention is that the learned trial Magistrate fell into error in ordering that interest on special damages do run from the time of judgment. Section 26 of the *Civil Procedure Act* provides for payment of interest in a suit for money, on the principal amount adjudged from the date of the suit to the date of the decree. The special damages were a liquidated claim thus the learned trial Magistrate misdirected herself in holding as she did that interest on special damages just like her award on general damages should run from the date of the judgment. This misdirection subjected the Appellant to injustice in that he was denied interest amounting to over Six Hundred Thousand Kenya Shillings.
  13. Counsel cited the case of *Akamba Public Road Services Ltd vs. Tabitha Kerubo Omambia* [2013]eKLR where the Court of Appeal, in a similar situation, held that the learned High Court Judge had misdirected himself in ordering special damages to run from the date of judgment.
  14. Counsel prayed that the court interfere with the judgment of the learned trial Magistrate by setting as the award of Kshs. 3,566,571 which is in fact arithmetically incorrect because 2,000,000'/= + 1,166,571/= is equal to Kshs. 3.166.571.00. Counsel proposed that the court enter judgement for the Appellant as follows; -
    - a. Kshs. 1,166,571.00 balance due to hospital after ..of (b)
    - b. Kshs. 615,627.00 paid directly to hospital
    - c. Kshs. 14,050 - (exhibit 4a 7b,5,a& 10) less 550/= which was not pleaded.
    - d. General damages Kshs. 2,000,000/=

Kshs. 1,795,698.00

Kshs. 3,795,698.00
  15. Counsel prayed that the sum of Kshs. 1,795.698.00 do attract interest from 13<sup>th</sup> October 2018 till judgment and until payment in full. Counsel prayed the court allow the appeal in full.

### **Respondents' Submissions**

16. Learned counsel for the respondent filed submissions dated 2<sup>nd</sup> June 2023. He urged that the Appellant did not produce any receipt for the sum of Kshs. 615, 627/= to sustain his claim for the said amount. The only document the Appellant produced was a hospital bill which in law is not proof of payment. Counsel submitted that special damages must not only be pleaded but also proved. Given that the said amount was not proved, it goes without saying that the subordinate Court was correct in not awarding the same and counsel prayed that this Court finds as much ad dismisses ground 1 of the appeal. The same position applies to the claim for Kshs. 5,000/= for the agreement and Kshs 6,500/= for the CT scan. Counsel cited the case of *Swalleh C. Kariuki & another v Violet Owiso Okuyu* (2021) eKLR



and the case of *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR in support of this submission.

17. It is the respondent's case that as for the claim that interest on special damages to run from date of filing suit, the award of interest is discretionary and section 26 of the *Civil Procedure Act* aptly sets out this position. As such, the award of interest and the period within which it is to run is left for the court to determine. The Subordinate Court having ordered that the interest should run from the date of judgment cannot be faulted especially when there is no evidence that the discretion was exercised wrongly. Counsel urged the court to dismiss the appeal and cited the case of *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* (1988) eKLR in support of this submission.
18. On the claim for costs, counsel urged that the Subordinate Court already awarded costs in the lower Court as such the prayer is superfluous. However, with regard to the claim that costs of the High Court ought to be borne by the Respondent, counsel urged that it is the Appellant who sought to challenge the award made by the Subordinate Court. The Respondent should not therefore be made to suffer on account of the Subordinate court exercising its discretionary powers in making the award. If anything, the costs ought to be awarded to the Respondent having been dragged to court again for a claim which it has already settle as per the terms of the lower Court judgment.

### **Analysis & Determination**

19. As this is a first appeal, I find that it is imperative to set out the duty of the trial court. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated 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.”

20. Further, in *PII Kenya Limited v Oppong* [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanour and giving allowance for that”.

21. Upon considering the Memorandum of appeal and submissions of the parties, the following issues arise for determination;
  - a. Whether the trial court erred in its award of special damages
  - b. Whether the trial court erred in its order on payment of interest

### **Whether the trial court erred in its award of special damages**

22. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded



by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

23. Notably, the present appeal challenges the award of special damages. It is trite law that special damages must be pleaded and proved. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“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.”

24. The appellants’ bone of contention is that the trial court erred by leaving out Kshs. 615,627 which was directly paid to Mediheal Hospital plus Kshs. 5,000/- for the agreement to release the appellant from the hospital, Kshs. 6,500 for the CT Scan and Kshs. 500/- for a copy of records at NTSA. From the plaint, it is not in dispute that the appellant pleaded the said special damages in his particulars of claim.
25. The next port of call is whether he proved the claimed damages. From a reading of the judgment by the trial court, it is evident that the appellant produced evidence of the special damages claimed, which evidence was produced as exhibits in court to wit; MFI 2(a) being a letter from the hospital and MFI 2(b) being the statement of the hospital bill amounting to Kshs. 615,627, Exhibit 4(a) and (b) being the motor vehicle search report and invoice for the search which cost Kshs. 550, Exhibit 10 being the receipt for the CT Scan which cost Kshs. 6,500. Upon acknowledging the documentary evidence that corroborated the testimony on special damages, the trial court went on to award Kshs. 1,166,571 as special damages.
26. I note that initially, the appellant was admitted at the facility from 4<sup>th</sup> march 2016 to 1<sup>st</sup> April 2016 and that his final bill was Kshs. 1,512,188. Further, there were payments made of Kshs. 615,627 which the hospital acknowledged vide their letter dated 26<sup>th</sup> August 2016. It is a well settled principle of law that an invoice is not proof of payment. Special damages can only be proved by producing actual receipts or invoices endorsed with the word “Paid” (see *Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR ). The appellant produced a receipt for consent fee of Kshs. 5,000/- as exhibit 9. He also produced a receipt for the CT Scan amounting to Kshs. 6,500/- and a paid invoice of Kshs. 550/-. However, for the Kshs. 615,627, there is no actual receipt evidencing payment. The court cannot rely on the cover letter or the bill as proof of payment in the circumstances.
27. It follows that the trial court erred in its computation of damages as it left out a total of Kshs. 12,050/ in special damages.

### **Whether the trial court erred in its order on payment of interest**

28. The appellant’s second ground of appeal was on the order on when the interest on special damages was supposed to run.



29. Section 26(1) of the *Civil Procedure Act* is explicit that;
- “where and in so far as decree is for payment of money, the court may, in the decree, order interest at such rate, as the court deems reasonable to be paid on the principal sum adjudged on sum principal sum for any period before the institution of the suit, with further interest as sum rate as the court deems reasonable on the aggregate so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”
30. Section 26(1) of the *Civil Procedure Act* provides that interest may be ordered on any principle sum before filing of the suit, with further interest at rates the court may deem fit and reasonable from the date of the decree to the date of payment. However, as a general principle of law, a special damage, once proved to the satisfaction of the court, as is in this appeal, the principle sum attracts interest at court rates, if silent on the rates, at 6%, from the date of filing of the suit, until payment in full.
31. In the premises, the appeal succeeds on this ground and therefore, the interest on special damages is to be calculated from the institution of the suit.

**Final Orders**

32. I hereby order as follows;
- a. The initial award of special damages is hereby set aside and substituted with an award as follows:  
Hospital Bill - Kshs. 1,164,561.00 /-  
NTSA Search - Kshs. 550/-  
CT Scan - Kshs. 6,500/-  
Agreement - Kshs. 5,000/-  
Total: Kshs. 1,176,611/-
  - b. Interest on Special damages to run from date of institution of suit
  - c. Interest on General Damages and Costs to run from date of judgement

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF JUNE 2024**

In the Presence of:  
Mr Sibika Advocate  
.....

**R. NYAKUNDI**  
**JUDGE**

