



**Magaiwa & another v Ondieki (Civil Appeal E099 of 2021)
[2023] KEHC 27499 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E099 OF 2021**

RPV WENDOH, J

MAY 11, 2023

BETWEEN

SAMSON RIOBA MAGAIWA 1ST APPELLANT

BEAUTY KEMUNTO NYANETI 2ND APPELLANT

AND

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 KebanCHA PMCC No. 17 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. By a Plaint dated 5/10/2018, the respondent instituted a suit seeking special damages, general damages, costs, interest and any other relief the court deemed fit to grant, as a result of injuries sustained by the respondent, from an accident which allegedly occurred on the 8/10/2015 involving motor vehicles registration number KCA 791A and KBD 184T along the Migori - Isebania Road. The respondent stated that he was the driver and/or owner of motor vehicle registration number KBD 184T and the same was under his control and/or management. It was also stated that the 1st appellant was the registered owner of 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.



3. The respondent pleaded that on 8/10/2015 he was lawfully driving his motor vehicle registration number KBD 184T when suddenly, the 2nd respondent's driver, servant and/or agent drove motor vehicle registration number KCA 791A carelessly and negligently at a high-speed causing it to hit the appellant's motor vehicle thereby extensively damaging it. It was further pleaded that as a result of the accident, the respondent's vehicle was damaged and he sustained bodily injuries, loss and damage. The respondent pleaded that the accident was solely caused by the negligence of 2nd appellant's driver, servant or agent and the appellants were liable under the doctrine of vicarious liability.
4. 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. The appellants further denied that the doctrines of res ipsa loquitor and subrogation applied as the same had not been established. The appellants also stated that no loss had not been proved as contended.
5. 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 list of documents dated 5/10/2018 be produced as PEXH No. 1 - 9 respectively and the supplementary list of documents dated 15/9/2020 be produced as PEX No. 10 - 12 respectively. It was also agreed that the medical report dated 10/9/2020 be produced as DEX No. 1. The respondent testified as PW1.
6. 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. 100,000/=, special damages of Kshs. 16,500/=, special damages under the doctrine of subrogation of Kshs. 352, 300/=, costs and interests of the suit from the date of judgement until payment in full.
7. 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 which award was equally excessive;
 - c. The learned Magistrate erred in law by failing to subject the awards made to agreed contribution on liability at 70:30% thus reaching erroneous determination;
 - d. The trial court failed to consider the appellants' submissions and authorities in support thereof;
 - e. The court misapprehended the principles applicable in computation of damages thus occasioning miscarriage of justice;
 - f. The trial court failed to properly evaluate the evidence on record thus reaching an erroneous decision;
 - g. That the judgement was entered in error as 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;
 - h. The trial court failed to subject the award to the agreed contribution;
8. The appellants prayed:-



- a. The appeal be allowed and the judgement and decree of the trial Magistrate dated 3/6/2021 be set aside and/or varied.
 - b. 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.
 - c. The costs of this appeal and costs incurred in the subordinate court be borne by the respondent.
 - d. Such other relief as the court may deem necessary.
9. 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 respondent admitted that he was issued with cheques for Kshs. 115, 000/=, 200,000/= and 150,000/= but the respondent only adduced receipts of cheques for Kshs. 17,300/=, 150,000/= and 115,000/=. It was further submitted that special damages must not only be specifically pleaded but the same must be proved and thereby the trial court erred by making an award of special damages under the doctrine of subrogation amounting to Kshs. 352, 300/= which were not proved.
 10. On the issue of liability, the appellants submitted that the trial Magistrate failed to subject the award made in general damages, special damages as well as costs to the agreed contribution on liability. The appellants asked the same to be reviewed.
 11. The respondent filed his submissions dated 15/12/2022 on even date. The respondent submitted on grounds 1, 2, 5 and 6 of the appellant's grounds of appeal; that the appellants were aware of the terms of the consent and there was no objection to the same; that the respondent's damaged vehicle was given a pre - assessment report which was prepared at a fee of Kshs. 17,300/=; that the pre-accident value of Kshs. 485,000/= paid by the assessors was priced at Kshs. 150,000/= and the respondent received full compensation as per the accident value of Kshs. 465,000/= less Kshs. 20,000/=; that the respondent claimed under this head a sum of Kshs. 335,000/= pre - accident value less the salvage of Kshs. 150,000/= retained by the insurer. On the doctrine of subrogation, the respondent relied on the findings in the case of Margaret Kannes Muyanga vs Jamal Abdulkarim Musa (2020) eKLR.
 12. In response to paragraphs 4 and 6, it was submitted that the bone of contention is cheques amounting to Kshs. 450,000/=; that the respondent produced as PEXH - 2 the claim documents as well as PEXH Nos. 3 (a), (b) and (c) as Kshs. 115,000/= dated 12/10/2016, Kshs. 200,000/= dated 15/7/2016 and Kshs. 150,000/= dated 19/8/2016 respectively. The appellants filed a supplementary record of appeal which bears a copy of a cheque for Kshs. 200,000/= which the appellants insisted it was missing.
 13. In response to paragraphs 3 and 8 of the grounds of opposition, it was submitted that the Magistrate subjected the 30% concession to the general damages of Kshs. 100,000/= making it 70,000/=; that for the special damages, the Magistrate did not err in not subjecting the special damages to contribution as it was held in the cases of Hashim Mohammed Said & Another vs Lawrence Kibor Tuwei (2018) eKLR and A.O. Bayusuf & Sons Limited vs Samuel Njoroge Kamau (2008) eKLR. The respondent urged this court to uphold the decision of the trial court.
 14. 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 vs Associated Motor Boat Co. Ltd* (1968) EA 123.
 15. 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.”

16. 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.
17. On the issue of quantum of general damages as a result of the bodily injuries, sustained, the respondent was treated at the Resolution Health Centre and there is an outpatient card dated 8/10/2015 confirming the treatment. There are medical reports from Dr. Morebu and Dr. J.A.S Kumenda dated 10/9/2019 which confirmed the injuries. The injuries were soft tissue injuries in nature and the medical reports indicate that the respondent had healed well. The trial Magistrate awarded the sum of Kshs. 100,000/= as general damages which is not contested. The same is hereby upheld.
18. On the special damages, it is trite law that special damages must be specifically pleaded and proved. The respondent pleaded for special damages under two limbs. Damages in respect to the medical expenses and damages under the doctrine of subrogation in respect to the loss of the damages of the respondent's motor vehicle.
19. In respect to the medical expenses, the respondent pleaded medical expenses of Kshs. 16,500/=. The respondent produced receipts totaling to Kshs. 16, 500/= “PEXH 9.” The award of Kshs. 16,500/= as the medical expenses was not contested and the same is hereby upheld.
20. In respect to the loss of the damaged motor vehicle, the appellants contested that the respondent did not prove the sum of Kshs. 352,300/= under the doctrine of subrogation. The appellant submitted that he proved the same by copies of cheques. The particulars of the loss pleaded by the respondent was: -
 - a. Pre - accident value - Kshs. 485,000/=.
 - b. Assessor's fees - Kshs. 17,300/=.
 - c. Search fees - Kshs. 550/=.
 - d. Subtotal - Kshs. 502, 850/=Less savage retained - Kshs. 150,000/=
- Total - Kshs. 352, 850/=.
21. The copies of cheques which were produced as exhibits are for Kshs. 150,000/= dated 19/8/2016, Kshs. 115,000/= dated 12/10/2016 and Kshs. 200,000/= dated 15/1/2016. The total amount of the cheques is Kshs. 465,000/=.
22. The claim by the appellants that the respondent did not prove the special damages for a claim of Kshs. 352, 850/= under the doctrine of subrogation is untrue. The award of Kshs. 352, 850/= is hereby upheld.



23. The appellants also faulted the trial Magistrate for not apportioning the contribution to the special damages. The trial court did apportion 30% contributory negligence on the general damages of Kshs. 100,000/= and awarded the respondent a sum of Kshs. 70,000/=. However, no contribution was made on the special damages.
24. Special damages are those expenses and/or losses suffered by the plaintiff due to the defendant's actions. Special damages cause some sort of economic loss on the part of the plaintiff, which he or she did not expect, as they are out of pocket expenses. In my view, I do not think that they should be subjected to contribution, as it was not for the actions of the defendant, the plaintiff would not have incurred the said expenses. I do not think that it is equitable for the plaintiff to be allowed to carry the blame to some extent or losses which they did not anticipate to incur due to another party's negligence. I find that the special damages should not be disturbed and they should not be subjected to contribution.
25. In the end, I find that the appeal is devoid of 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 11TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Ms. Wakiaga for the Appellant.

Mr. Migiro holding brief for Mr. Kering for the Respondent.

Nyauke Court Assistant.

