



**Ali & another v Kamau (Civil Appeal 37 of 2022)  
[2023] KEHC 22410 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22410 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL 37 OF 2022  
FR OLEL, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**ALI OMAR ALI ..... 1<sup>ST</sup> APPELLANT**

**ABDIHAKIM ADAN ABDOW ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SOPHIA WAITHERA KAMAU ..... RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT OF HON N. SHIUNDU LUTTA (C.M.)  
DELIVERED ON 30<sup>th</sup> MARCH 2022 IN NAIVASHA CMCC NO E136 OF 2020)***

**JUDGMENT**

**Background**

1. The Appellant's were the defendants in the primary suit, and were sued as the registered co-owner of Motor vehicle KBU 868L/ZC 8146. It was alleged that on December 30, 2017 at about 5.00pm the respondent herein was lawfully driving her motor vehicle registration Number KBM 056M ( Hereinafter referred to as the 1<sup>st</sup> suit motor vehicle ) along Nairobi - Maai Mahiu/Naivasha road, when the appellants motor vehicle Registration Number KBU 868L/ZC 8146(Hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle) was negligently driven, managed and or controlled by themselves, their agent, servant and/or authorized employee whereby the said appellants driver rammed into the rear of the 1<sup>st</sup> suit motor vehicle thereby causing the respondent to suffer serious injuries. The Plaintiff prayed for general damages, special damages, costs and interest of the suit.
2. The appellants did file their statement of defense on April 27, 2021, where they denied liability in toto and further stated that if indeed the respondent was injured, it was caused substantially by her negligence and thus was liable for contributory negligence, which details were particularized in the statement of defence. Further the appellant averred that they could not be held liable as their driver



exercised all reasonable diligence, skill and care to avoid the said accident and it was the respondent to blame for the occurrence of the said accident.

3. During hearing the suit, liability was by consent apportioned at 90:10 in favour of the respondent herein. The parties further agreed to adopt the documents filed in the list of documents as Exhibits and thereafter made submissions on quantum. The learned magistrate in the judgment delivered on March 30, 2022 proceeded to award damages for General Damages of Ksh 600,000/=, special damages were also proved to the tune of Ksh 1,124,293.61/=, less 10%, together with costs and interest.
4. The Appellant's, being dissatisfied by the whole judgment did file their memorandum of Appeal on April 27, 2022 and raised several grounds of appeal namely: -
  - a. That the learned trial Magistrate erred in law and misdirected himself in law and fact by awarding special damages of Ksh 833,441/= being medical expenses paid by teacher's service commission and thus not due to the respondent.
  - b. That the learned trial Magistrate's erred in law and fact by applying the wrong and/or did not apply the applicable law, tests doctrines and principles at all or correctly.
  - c. That the learned trial Magistrate erred in law and fact by taking irrelevant matters or by not taking relevant matters/evidence into consideration.
5. The appellants sought that this appeal be allowed with costs and the award of special damages amounting to Kshs.833,441/= be set aside.

### Submissions

6. The Appellants relied on their written submissions filed in court on December 21, 2022 and raised the following three issues for determination;
  - a. Whether the learned Magistrate erred and misdirected himself in law and fact by awarding special damages of Kshs 833,441/= being medical expenses without taking into consideration that, that portion of the medical expenses was paid by the Teachers service commission and thus not due to the Respondent.
  - b. Whether the learned Magistrate erred in law and fact by applying the wrong and/or did not apply the applicable tests, doctrines and principles at all or correctly.
  - c. Whether the learned Magistrate erred in law and fact by not taking relevant matters/Evidence into consideration.
7. The appellants did submit the special damages must be specifically pleaded and proved before the same can be awarded. The respondent had claimed a sum of Kshs.1,124,293.61/= and the court wrongly awarded the same, yet the respondent's insurer had paid Kshs.833,441.00/=. To again award the respondent the said sum would amount to unjust enrichment. Reliance was placed on *Pitty Gathigia Baaru & Ano v Kenya Bus Services & Ano*, HCC No 154 of 1999, *Chase International Investments Corporation & Ano v Laxman Keshra & others* (1978 ) KLR 143 , *John Mwangi Munyiri & Another v Paul Wachira Njuguna* (2020 ) Eklr and *KIP Melamine & 2 others v Violet Waitihiri Gichia* ( 2017 ) eKLR.
8. The final invoice from Nairobi women's Hospital dated November 12, 2020 revealed that an amount of Kshs.794,440.55/= was paid by the insurance under the Teachers service commission scheme. Additionally, the various outpatient invoices from the same invoices totaling to Ksh 39,000/= were



paid by the insurance under the same scheme. This amount totaled to Kshs.833,481/= was not paid by the respondent from her pocket and thus she was not entitled to be awarded the same

9. In conclusion the appellant did pray and asked that this appeal allowed, the sum of Ksh 833,481/= be deducted off the special damages as awarded.
10. The respondent did not file any written submissions in opposing this appeal.

### **Determination**

11. In A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari ( Deceased)* by L.Rs (2001) 3 SCC 179.
12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316
13. Therefore, this court has a solemn duty to delve at some length into factual details and revisit facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.
14. From the record the only issue for determination in this appeal is whether the trial magistrate erred and misdirected himself in law and fact by awarding special damages of Ksh 833,441/= without taking into consideration that, a portion of the said medical expenses was paid by Teachers service commission and thus not due to the Respondent.
15. In *Ali Vrs Nyambu T/A Sisera Stores* (1990 ) 534 534 at page 538, the court cited with approval the principles that were laid down by the *Privy council in Nance Vrs British Colombia Electrical Railways Company Ltd* (1951) AC 601 at page 613 to be that

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own, for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of the first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge in assessing the damages applied a wrong principle of law ( As by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately high that it must be wholly erroneous estimate of the damage’s.( *Flint v Lovell* (1935) 1KB 354 ) approved by House of lords in *Davis v Powell Duffryn Associated collieries Ltd* (1941) AC 601.”



16. The same principle was applied in the decision of *Butt v Khan* (1982 – 88 ) KAR where the court of Appeal stated that;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

17. This principal has been applied repeatedly in many other cases i.e see *Kemfro Africa Ltd T/A Meru Express Vrs Lubia and olive lubia* (1982-88) 1KAR 727

18. The Respondent claimed Ksh 1,124,293.61/= as special damages and did produce a bundle of receipts/ invoices from various hospitals, Taxi services, optician, dental surgeon, and towing receipts to indeed prove that she did incur these expenses. The appellant contention in this appeal is that a portion of the medical expenses totalling to Ksh 833,441/= was paid by the respondent employer Teachers service commission.

19. Indeed, having reviewed the invoices from The Nairobi Women’s Hospital which were produced as Exhibits at trial, they indeed show that the final invoice for in-patient services was Ksh 794,440.55 and for outpatient services the invoices totalled Kshs 39,001/=. These invoices were credited to Minet Kenya Insurance Brokers Limited and the scheme was Teachers service commission.

20. The law as regards special damages is quite clear. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of our 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 JA – 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 decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

21. The respondent indeed did specifically plead the special damages sought of Ksh 1,124,293.61/= but unfortunately did not produce into evidence all receipts to prove that she paid/incurred this amount from her own sources to enable her lawfully claim recovery of the same. Part of her Exhibits were invoices from The Nairobi women’s Hospital totaling to Ksh 833,441/= was paid by the Insurance Company as stated in *Christin Mwigina Akonya v Samuel Kairu Chege* (2017) eKLR

“Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR; *Sanya Hassan v Soma Properties Ltd.*”



22. Further as submitted by the appellant, if the amount of Ksh 833,441.00/= was paid, it was paid by the respondent's insurer under the Teachers service commission scheme and therefore the respondent was not entitled to be compensated for this amount as that would amount to double compensation and would run foul of the doctrine of unjust enrichment.
23. The appellants submissions holds true. The trial magistrate fell in error and applied the wrong principle of law, by failing to consider this aspect that part of the hospital bill was paid by the respondent's insurer and therefore she was not entitled to be awarded special damages for the sums paid by the insurer.
24. In *Pitty Gathigia Baaru & Ano v Kenya Bus services & Another* HCC No 154 of 1999, Angawa J observed that;

“In the above claim the plaintiff informed the court that she was employed as a clerk with the Kenya power and lighting company. That at the time of the accident her bill was fully paid by the employer. She is therefore not permitted to come to court to claim this sum as it would amount to double enrichment. It is also noted that the defendant can only pay this claim if the employer or insurance claims a subrogation claim in the name of the plaintiff. They are therefore require to attend as witnesses to indicate that the sum has been paid. At times, employers would deduct the sums paid from an employee's salary.”

### **Disposition**

25. This appeal therefore has merit. The judgment of Honourable Nathan Shiundu Lutta (CM) dated March 30, 2022, with respect to the award of special damages of Kshs 1,124,293.61/= is hereby set aside and the same is reduced to Kshs 290,812.61/=. All other aspects of the judgment will remain as was awarded.
26. Each party will bear their costs for this appeal
27. Orders accordingly

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023**

**In the presence of:**

.....for Appellant  
 .....for Respondent  
 .....Court Assistant

