



REPUBLIC OF KENYA



**Kyule v Thuku & another (Civil Case E125 of 2021)
[2025] KEMC 227 (KLR) (4 August 2025) (Judgment)**

Neutral citation: [2025] KEMC 227 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E125 OF 2021
YA SHIKANDA, SPM
AUGUST 4, 2025**

BETWEEN

PATRICK THENDU KYULE PLAINTIFF

AND

MARION NDATA THUKU 1ST DEFENDANT

DAVID KIKOVI MUINDI 2ND DEFENDANT

JUDGMENT

THE CLAIM

1. Patrick Thendu Kyule [hereinafter referred to as the plaintiff] filed this suit on 19/5/2021 vide a plaint dated 18/5/2021. He sued Marion Ndata Thuku and David Kikovi Muindi [hereinafter referred to as the 1st and 2nd defendants respectively] on account of a road traffic accident that allegedly occurred on 24/5/2018 at Civicon area along Nairobi-Mombasa road. The plaintiff averred that on the material day, the plaintiff's motor vehicle registration number KCA 482S was lawfully being driven along the aforementioned road when suddenly, the 2nd defendant, being the 1st defendant's driver so carelessly drove motor vehicle registration number KCP 469M and rammed the same into the right side body of the Plaintiff's motor vehicle, leading to extensive damage and huge repair costs and associated losses.
2. The 1st defendant was sued as the registered and beneficial owner of motor vehicle registration number KCP 469M whereas the 2nd defendant was used as the driver thereof at the material time. The plaintiff averred that the suit was brought in his name by CIC General Insurance Ltd under the doctrine of subrogation. That the accident was solely caused by the negligence of the 2nd defendant and the plaintiff holds the 1st defendant vicariously liable for the negligence of the 2nd defendant. The plaintiff pleaded several particulars of negligence against the 1st defendant. I will not reproduce the particulars of negligence since the parties entered into a consent on liability. The plaintiff thus prays for judgment against the defendant for:



- a. Special damages of Ksh. 1,587,450/=;
- b. Costs of this suit;
- c. Interest on the above;
- d. Any further relief that this Honourable court may deem fit to grant.

THE DEFENCE

3. The defendants entered appearance on 21/10/2021 and filed a statement of defence on the same day in which they denied the plaintiff's claim in toto. The defendants denied that they were the registered owner and driver respectively of motor vehicle registration number KCP 469M, denied the occurrence of the accident on the material day, denied that the accident involved the two motor vehicles and averred that if the accident occurred, the same was solely caused or substantially contributed to by the plaintiff's driver. The defendants pleaded several particulars of negligence as against the plaintiff's driver but I will not reproduce them for the reason already given hereinabove. The defendants prayed that the plaintiff's suit be dismissed with costs.

CONSENT ON LIABILITY

4. The record indicates that on 6/11/2023, the parties recorded a consent on liability. However, there is no indication on record that the same was adopted as an order of the court. Since the parties are in agreement, vide this judgment, I hereby adopt the consent on liability. Consequently, the plaintiff shall be held 20% liable whereas the defendants shall be held 80% liable.

THE EVIDENCE

The Plaintiff's Case

5. The Plaintiff called two witnesses in support of his case. PW 1 Japheth Mumo Kilonzi adopted his witness statement in evidence. He testified that he was the Claims Analyst at CIC General Insurance Limited. That the Insurance company insured motor vehicle registration number KCA 482S. The witness stated that following the accident, the motor vehicle was assessed. That the plaintiff claims a sum of Ksh. 1,587,450/= and incidental costs. The witness produced documents in support of the plaintiff's case. PW 2 Silas Kangi Mbogori testified that he was a motor vehicle assessor. That he did the assessment on the plaintiff's motor vehicle. The witness produced a report in evidence.

The Defence Case

6. The defendants did not call any witness.

MAIN ISSUES FOR DETERMINATION

7. In my opinion, the main issues for determination are as follows:
 - i. Whether the plaintiff suffered loss and damage as a result of the alleged accident;
 - ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
 - iii. Who should bear the costs of this suit?



THE PLAINTIFF'S SUBMISSIONS

8. The plaintiff relied on his evidence on record and submitted that he had proven his case. The plaintiff also submitted on an intended amendment to tracing fees as pleaded in the plaint. The plaintiff urged the court to award judgment in his favour.

THE DEFENDANTS' SUBMISSIONS

9. The defendants did not file submissions despite having been given sufficient time to do so.

ANALYSIS AND DETERMINATION

10. I have carefully considered the evidence on record. The plaintiff pleaded special damages as follows:
- a. Repair Costs.....Ksh. 1,548,900/=;
 - b. Assessment fees.....Ksh. 11,600/=;
 - c. Tracing fees.....Ksh. 23,815/=
11. The plaintiff produced an assessment report which clearly shows that his motor vehicle was damaged as a result of the accident. I am satisfied that the plaintiff suffered loss and is thus entitled to damages as against the defendants. The plaintiff's claim is basically one for special damages. It is trite law that special damages must be specifically pleaded and strictly proved. In *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* the court said:
- “It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded”
12. In *Ouma v Nairobi City Council* [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J [as he then was] quoted in support the following passage from Bowen L.J's Judgment on page 532 and 533 in *Ratcliffe v Evans* [1832] 2Q.B. 524 an English leading case on pleading and proof of damage:
- “The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”
13. Similarly, in the case of *Hahn v Singh* [1985] KLR 716, it was held that:
- “... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences 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 the nature of the act themselves.”



14. In the case of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] KEHC 1484 [KLR], Joel Ngugi J [as he then was] held that:

“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*. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice.”

15. In *Total [Kenya] Limited Formally Caltex Oil [Kenya] Limited v Janevams Limited* [2015] KECA 822 [KLR], the Court of Appeal held:

“A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”

16. In the authority of *Jonathan Njenga v Hassan Faraj Aboud* [1987] KECA 17 [KLR], the Court of Appeal [per Platt JA] was of the view that in cases of material damage, the victim would be entitled to compensation for depreciation of his motor vehicle. The compensation is arrived at by getting the pre-accident value of the car less the scrap value. Similarly, in *Herbert Hahn v Amrik Singh* [1985] KECA 68 [KLR], the Court of Appeal observed:

“The appellant was, nevertheless, entitled to the depreciation in the value of his vehicle resulting from the accident. That depreciation is calculated by deducting the post-accident estimated market value from the estimated pre-accident market value of the motor vehicle and getting the difference, if any, which represents the loss the plaintiff will suffer at the time of resale of his vehicle and which is recoverable. But this loss has to be proved by evidence and is not automatic.”

17. The position was also alluded to in the authority of *David Bagine v Martin Bundi* [1997] KECA 54 [KLR] in which the court of Appeal held:

“We come now to the issue of special damages award for Kshs. 277,750/= for repair costs. Counsel for the appellant argued that the respondent could properly only have claimed such sum as he actually spent towards repair of his lorry and that he could not have claimed on the basis of an estimate of costs of parts to be replaced.....No evidence by any expert was called to prove the exact repair costs. Nor was there any evidence to show what was the pre-accident value of the lorry and the salvage value [if the lorry was indeed a wreck]. There was nothing to show if the sum of Kshs. 277,750 could have properly been spent to put the



lorry back on the road.....The best evidence in this respect could have been supplied by an automobile assessor.”

18. The foregoing reveals that there are two ways in which a claimant may be compensated for damages for material damage;
 - a. Where the property is repaired and repair costs are proven. In this case, the claimant must prove loss incurred in terms of repair costs by production of receipts for payment of the costs;
 - b. Where the property is beyond repair and written off, the claimant may be paid the pre-accident value thereof. If the property can be salvaged, compensation is reached by deducting the salvage value from the pre-accident value.
19. In this case, there is sufficient evidence to prove that the repairs to the motor vehicle costs Ksh. 1,548,900/=. The plaintiff produced documents to show that the amount was actually paid for the repairs. A receipt was produced in evidence. There is also a receipt to prove that Ksh. 11,600/= was paid as assessment fees. For tracing fees, the plaintiff pleaded Ksh. 23,815/=. The record indicates that on 6/11/2023 the plaintiff made an oral application for the figure to be amended to Ksh. 26,950/=. The application was opposed by the defence. The court did not rule on the application but directed the parties to file submissions on the issue and that the court would determine the same in the judgment.
20. With all due respect to my predecessor, I doubt that the court can make a determination on an interlocutory application in the judgment. The court ought to have ruled on the application either on the spot or at a later stage but before the judgment. For those reasons, I decline to consider the application for amendment at this stage. In support of the claim, the plaintiff produced an invoice, a payment requisition voucher and a receipt. The receipt is for Ksh. 17,100/=. There is no receipt for the amount claimed. The plaintiff cannot rely on the payment requisition voucher as that is not proof of payment. It is just a requisition. Consequently, only Ksh. 17,100/= is awardable for tracing fees.

DISPOSITION

21. In summary, I hold that the plaintiff has proven his case on a balance of probability as against the defendants. Consequently, I make the following awards:
 1. Total Special damages.....Ksh. 1,577,600/=
 2. Less 20% contribution.....Ksh. 315,520/=
 3. Balance due to the plaintiff.....Ksh. 1,262,080/=
22. The plaintiff is also awarded costs of the suit and interest. The plaintiff prays for interest from the date of filing suit until payment in full. The guiding principles in respect of interest are set out in section 26 of the *Civil Procedure Act* which provides that:

“ [1] Where and in so far as a decree is for the 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 from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

[2] Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date



of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

23. In the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others* [2018] eKLR, the court stated that:

“First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.

Second, Under Section 26[1] of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:

- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
- b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”

24. Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of *Omunyokol Akol Johnson v Attorney General* [Civil Appeal No.6 of 2012, UGSC 4 [8th April 2015] stated in part, as follows:

“It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment.” [Emphasis supplied]

25. From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see *Jane Ovuyanzi Raphael* [Suing as Legal Representative of Estate of *Japheth Amaayi v Salina Transporters* [2020] KEHC 618 [KLR].

26. Consequently, interest on the special damages awarded shall accrue from the date of filing suit to the date of judgment/decreed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 4TH DAY OF AUGUST, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

