



REPUBLIC OF KENYA



**KENYA LAW**  
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**Barasa v Sirengo (Civil Appeal E102 of 2024)  
[2025] KEHC 15014 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL E102 OF 2024**

**AC BETT, J**

**OCTOBER 23, 2025**

**BETWEEN**

**AINEA WAFULA BARASA ..... APPELLANT**

**AND**

**DISHON KHISA SIRENGO ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. A. A. Odawo (PM) in  
Kakamega CMCC. No. E081 of 2021 delivered on 15th May 2024)*

**JUDGMENT**

**Introduction**

1. The Appellant instituted a civil claim against the Respondent before the Chief Magistrate's Court at Kakamega in Civil Case No. E081 of 2021. He contended that in the year 2015, he was summoned to the Directorate of Criminal Investigations (DCI) offices at Lumakanda, where he was arrested on allegations of having obtained money from the Respondent by false pretences. However, upon conclusion of investigations, it emerged that it was the Respondent who had forged documents bearing the Appellant's name and signature.
2. As a result of the said investigations, the Respondent was charged before the Chief Magistrate's Court at Kakamega in Criminal Case No. 3223 of 2016 with the offences of forgery and uttering a false document. Upon conclusion of the trial, the Respondent was convicted accordingly.
3. The Appellant averred that he was compelled to engage the services of an Advocate to watch brief on his behalf during the said criminal proceedings. He therefore sought to recover from the Respondent the sum of Kshs. 631,000/= being special damages allegedly incurred as legal fees, together with compensation for psychological trauma and mental anguish occasioned by his involvement in the criminal process.



4. In a judgment delivered on 15<sup>th</sup> May 2024, the trial court dismissed the Appellant’s claim for both special and general damages. The court reasoned that the Appellant’s decision to retain an Advocate to watch brief was a personal choice, since the criminal proceedings fell within the mandate of the Office of the Director of Public Prosecutions (ODPP). The court further held that the Advocate–Client relationship was contractual as between the Appellant and his Counsel, and it would be unjust to impose liability for such contractual obligations upon the Respondent.
5. The trial court consequently held that the Appellant had failed to prove his case on a balance of probabilities and dismissed the claim with costs to the Respondent.
6. Being dissatisfied with the said judgment, the Appellant lodged a Memorandum of Appeal dated 3<sup>rd</sup> June 2024, raising, inter alia, the following grounds:-
  - a. That the Learned magistrate erred in law in narrowing the triable issues to only one; whether the plaintiff was entitled to the prayers he sought, yet there were several triable issues evident in the pleadings and the proceedings.
  - b. That the learned magistrate completely failed to appreciate the import of the [victim protection act](#), No. 14 of 2014 as revised in 2019 in holding that despite the Defendant being found guilty of fraud against the plaintiff, the plaintiff had no recourse to compensation just because criminal proceedings are public in nature and that “it was the plaintiff’s choice to engage counsel” and even awarded costs against him.
  - c. That the learned magistrate misdirected himself in law in finding that by the plaintiff bringing the civil suit against the Defendant,” the Defendant was being tried afresh,” yet the rule of *autrefois* convict or acquit does not apply to civil proceedings.
  - d. That the learned magistrate completely ignored the Appellant’s submissions.
  - e. That the learned magistrate gave his judgment against the weight of the evidence.
7. The appeal was canvassed by way of written submissions.
8. In his submissions dated 20<sup>th</sup> January 2025, the Appellant identified three issues for determination.
9. On the first issue, whether he was entitled to damages incurred as a result of instructing an Advocate to watch brief on his behalf, the Appellant relied on bank and M-Pesa statements evidencing payments totaling Kshs. 631,000/= to his Counsel in Criminal Case No. 3223 of 2016. He contended that the sums were specifically pleaded and strictly proved. He cited *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR, and urged reliance on *Agroline Haulier Limited & Joseph Opiyo Omollo v Abango Kisenba* [2015] eKLR and *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR.
10. On the second issue, namely whether the civil claim amounted to a fresh trial against the Respondent, the Appellant invoked Section 193A of the Criminal Procedure Code, which permits criminal and civil proceedings arising from the same facts to proceed concurrently. He submitted that the trial court failed to appreciate that the doctrines of *autrefois* acquit and *autrefois* convict have no application to civil proceedings.
11. On the final issue, the Appellant maintained that he had proved his claim on a balance of probabilities and that the trial court misdirected itself by failing to evaluate the evidence on record.
12. He thus prayed that the appeal be allowed, the judgment of the lower court be set aside, and judgment entered in his favour as sought in the *Plaint*.



13. The Respondent, in his submissions dated 6<sup>th</sup> May 2025, opposed the appeal. He contended that the claim was founded on fraud and argued that the Appellant had voluntarily entered into a land transaction with him. He further filed a supplementary list of documents in support of his defence.

### **Analysis and Determination**

14. I have carefully considered the Memorandum of Appeal, the record, the submissions filed by both parties, and the applicable law. As the first appellate court, this Court is mandated to re-consider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses. This duty was stated in *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123, and reaffirmed in *Mwanasokoni v Kenya Bus Service Ltd* [1982–88] 1 KAR 278.
15. From the pleadings and submissions, three key issues arise for determination:
  - a) Whether the civil claim amounted to a re-trial contrary to the rule against double jeopardy.
  - b) Whether the trial court erred in holding that the Appellant was not entitled to claim damages for legal fees incurred in engaging an Advocate to watch brief in the criminal case.
  - c) Whether the Appellant proved his claim on a balance of probabilities.
16. The Appellant contends that the trial Magistrate erred by focusing solely on whether he was entitled to the prayers sought, ignoring other issues in the pleadings. The trial court’s judgment centered on the contractual nature of the Advocate-Client relationship and the public nature of criminal prosecutions. This approach was appropriate, as the core issue was whether the Respondent could be held liable for the Appellant’s voluntary decision to incur legal fees.
17. In *Kanja v Republic* [2004] KLR 356, the Court held that a trial court is not obligated to address every issue raised in pleadings if they are peripheral to the central question of liability. The trial Magistrate correctly identified that the Appellant’s claim hinged on establishing a direct causal link between the Respondent’s actions and the claimed damages, which was adequately addressed.
18. The Appellant further argues that the trial Magistrate erred in suggesting that the civil suit amounted to retrying the Respondent. While the trial court’s reference to a “fresh trial” was imprecise, it did not materially affect the decision. The court’s reasoning was that the civil claim sought to impose liability for consequences not directly flowing from the Respondent’s conviction, which was a valid consideration.
19. Section 193A of the Criminal Procedure Code expressly provides that the institution of criminal proceedings shall not be a bar to civil proceedings arising from the same set of facts. The doctrine of *autrefois convict* or *autrefois acquit* applies to criminal trials and does not preclude a civil suit based on the same facts. The Court of Appeal in *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR affirmed that criminal liability and civil liability can co-exist where the same facts disclose both causes of action.
20. Accordingly, the Appellant was entitled in law to pursue a civil claim for damages notwithstanding the earlier criminal conviction of the Respondent.



21. The right of a victim of a crime to legal representation is embedded in Article 50 (9) of *the Constitution* which provides:-

“Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

To give effect to the said constitutional provision, the Victim’s Protection Act was enacted in 2014 and provides under Section 4 (2) that:-

“Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—

- (a) the court, administrative body or person does not discriminate against any victim on the basis of race, colour, gender, age, language, creed, religion, nationality, political or other opinion, cultural belief or practices, property, birth or family status, ethnic or social origin, disability, or any other grounds;
- (b) every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;
- (c) the victim's dignity is preserved at all stages of a case involving the victim, from the pre-trial to post-trial phase;
- (d) every victim is addressed in a manner appropriate to his or her age, intellectual development, and is spoken to and allowed to speak in his or her language of choice, or through an interpreter if necessary;
- (e) every victim is treated in a manner which takes into account his or her cultural values and beliefs;
- (f) every victim is protected from secondary victimization in all informal, administrative and judicial proceedings relating to the victim;
- (g) every victim is accorded legal and social services of his or her own choice and if the victim is a vulnerable victim within the meaning of this Act, then he or she shall be entitled to legal and social services at the State's expense;
- (h) vulnerable victim is entitled to contact his or her family or any primary care giver;
- (i) the victim's dignity is upheld at all times;
- (j) the victim's cultural values and beliefs are respected;
- (k) the victim is not discriminated; and
- (l) the victim is protected from victimization of any sort.”

22. It can be deduced from the *Victim Protection Act* that a victim has a right to legal representation. This was affirmed in the case of Republic v. Joseph Lentrrix Waswa [2016] KEHC 3660 (KLR) when the court held that:-

“29. From the Cited Articles of *the Constitution* 2010, provisions of the *Victim Protection Act* 2014 and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the



arguments advanced by the defence are certainly out of place and would if adopted by court be contrary to the provision of *the Constitution* and the *Victim Protection Act*, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.

30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavani and as advocated by counsel for the family herein. The above Indian case in that regard is distinguishable as the *Victim Protection Act* 2014 gives the parameters of involvement during trial to include; the victim's views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not thought out the trial and parallel to the prosecution."
23. It cannot be gainsaid that the main prosecutor in a criminal case is the Office of the Director of Public Prosecutions (ODPP). Nonetheless, there may be certain cases where it is necessary for the victim's Advocate to assist the prosecution especially in complex matters. I have considered the record from the criminal proceedings and do not find anything that was complex in the charges facing the Respondent. The Advocate watching brief remained as a passive observer on the four days that he attended court.
24. The Appellant relies on Section 4 of the *Victim Protection Act*, 2014, to advance his case. However, Section 23 of the Act provides the legal framework for reparative justice and stipulates that the victim of a crime has a right to be compensated by the offender for:-
- "(a)Economic loss occasioned by the offence;
  - (b)Loss of or damage to property;
  - (c)Loss of user over the property;
  - (d)Personal injury;
  - (e)Costs of any medical or psychological treatment; and
  - (f) Costs of necessary transportation and accommodation suffered or incurred as a result of an offence."
25. Although Section 23 of the *Victim Protection Act* relates only to criminal proceedings, the same can be extended to apply when considering a civil claim by a victim. However, the right to be compensated for loss arising from a criminal offence is subject to proof within the usual parameters of civil proceedings. The Act requires a clear nexus between the harm and the offender's actions. It is trite that compensation under victim protection laws is not automatic and must be supported by evidence of direct loss attributable to the defendant's conduct.
26. The Appellant submits that the trial court ignored his submissions and evidence, including bank and M-Pesa statements proving payment of Kshs. 631,000/=. While the Appellant proved the payment, he did not prove that it was in settlement of legal fees arising from the criminal case. He did not produce a fee note from the Advocate who held watching brief nor an official receipt in acknowledgement of the payment. The payment could as well have been in respect of a different transaction altogether. It is trite law that he who alleges must prove and for special damages, there must be strict proof. It was necessary that the Appellant proves that he incurred the special damages directly as a result of contracting an advocate to watch brief on his behalf more so in light of the fact that the sum of Ksh. 631,000/= was



an enormous figure that was not subjected to assessment by the court's Taxing Master. In *Capital Fish Kenya Limited v. The Kenya Power & Lighting Company Limited* [2016] KECA 56 KLR, the Court of Appeal emphasized that special damages must not only be proved but also directly attributable to the defendant's actions and rendered itself thus:-

“The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.”

27. Even if I were to find that the Appellant proved that he rightfully suffered the special damages as claimed, the question still remains, is he entitled to the same? Fees for holding a watching brief are a private arrangement between a complainant and his advocate and is not automatically recoverable as of right. The Respondent was not a party to the arrangement and for the Appellant to succeed in his claim, he needed to demonstrate that the ODPP would not have successfully prosecuted the case in the absence of his Advocate and that the legal fees was a necessary consequences of the Respondent's forgery, as opposed to a personal choice.
28. Here, the Appellant's decision to hire an Advocate was discretionary, as the ODPP prosecuted the criminal case. The trial court rightly held that the Respondent could not be held liable for a contractual obligation entered into voluntarily by the Appellant. The *Victim Protection Act* does not impose liability for incidental expenses unless they are a direct and necessary consequence of the crime, which was not established in this case.
29. Regarding general damages, the Appellant did not provide medical or other evidence to substantiate psychological trauma, as required in *Kemfro Africa Ltd v Lubia* [1987] KLR 30, where the Court held that claims for mental distress must be supported by cogent evidence. The trial court's finding that the Appellant failed to prove his case on a balance of probabilities was supported by the evidence.
30. The Respondent, in his submissions, opposed the appeal, alleging fraud by the Appellant in a land transaction. While these allegations were not substantiated, the burden lies on the Appellant to prove that the trial court's decision was erroneous. In *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal held that an appellate court will not interfere with a trial court's findings unless they are based on a misapprehension of evidence or law.
31. The Appellant's reliance on *Agroline Haulier Limited v Abango Kisemba* [2015] eKLR and *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR is misplaced, as those cases involved direct losses attributable to the defendants' actions, unlike the present case, where the legal fees were a discretionary expense.
32. The trial magistrate did not err in law or fact. The decision to dismiss the appellant's claim was supported by the evidence and consistent with legal principles governing special and general damages. The Appellant failed to establish a direct causal link between the Respondent's actions and the claimed damages, and the trial court's findings were within the bounds of reason.
33. In the circumstances, this court finds no merit in the present appeal and hereby dismisses it with costs to the Respondent.
34. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**



**A. C. BETT**

**JUDGE**

In the presence of:

No appearance for the Appellant

Respondent in person

Court Assistant: Polycap

