Lemosiany v Gicheru (Civil Appeal E020 of 2023)
[2025] KEHC 15619 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15619 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E020 OF 2023

AK NDUNG'U, J

OCTOBER 28, 2025

BETWEEN

DANIEL MARASI LEMOSIANY ..... APPELLANT

AND

FAITH GICHERU ..... RESPONDENT

(Appeal from the judgment passed on 10/08/2024 in Nanyuki CM Civil Case No. 99 of 2021-V Masivo (SRM))

JUDGMENT

1. By amended plaint dated 08/04/2022, the Appellant sued the Respondent seeking general damages under the *Law Reform Act* compensation for future medical expenses, special damages of Kshs.943,800/-, compensation for motor cycle, interest and costs of the suit. It was averred that the Appellant was lawfully riding his motor cycle registration number KMET 374W when the Respondent in total disregard of the Appellant, carelessly joined the road and caused a collision between motor vehicle registration number KCL 362P and his motor cycle causing him to sustain grievous body injuries. He averred that the accident was solely caused by the negligence of the Respondent in the manner that she drove the said motor vehicle. He listed the particulars of negligence on part of the Respondent and also listed the particulars of injuries sustained. He averred that due to the serious injuries he sustained, he will be required to seek for further corrective surgeries and that his motor cycle was extensively damaged and was declared a total loss.

2. The Respondent filed a defence and counterclaim dated 01/10/2021 denying that the Respondent was the beneficial owner or driver of the subject motor vehicle and denied the occurrence of the accident, the particulars of negligence and that if any accident occurred as alleged, it was as a result of the Appellant's negligence and listed the particulars of negligence on part of the Appellant. She denied the particulars of injuries and particulars of special damages. In the counterclaim, she averred that she was the registered owner of motor vehicle registration number KCL 362P and on 10/09/2019,

she was driving the subject motor vehicle towards Makutano and as she approached Likii river bridge, the Appellant negligently and recklessly controlled the subject motor cycle and caused it to collide and ram into her motor vehicle thereby causing loss and extensive damage. She listed the particulars of negligence on part of the Appellant and averred that as a result, her motor vehicle was extensively damaged occasioning her great loss totalling to Kshs.631,720/-. She averred that the motor vehicle was insured by CIC general insurance ltd and she therefore sought compensation under subrogation rights from the Appellant for the expenses incurred in indemnifying the Respondent. She therefore sought for the Appellant's suit to be dismissed and her counterclaim be admitted and special damages be awarded together with interest and costs.

3. The matter proceeded for hearing and the trial court apportioned liability on both parties in the ratio of 50:50. He also awarded the Appellant Kshs.1,500,000/- as general damages, Kshs.500,000/- as future medical expenses, Kshs.171,344/- as special damages, interest and cost of the suit. The Respondent was also awarded Kshs.614,220/- as special damages and cost of the counterclaim.

4. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 18/08/2023 raising the following grounds of appeal;

    i. The learned magistrate erred by apportioning liability at 50:50 considering the evidence and injuries suffered by the Appellant.

    ii. The learned magistrate erred in granting special damages to the Respondent without strict proof of the same.

    iii. The learned magistrate erred in granting special damages to the Respondent which had already been paid by the insurance company in compensation.

    iv. The learned magistrate erred in entering judgment for both the Appellant and the Respondent without clearly stating direct figures due to parties.

    v. The learned magistrate erred by failing to consider all evidence availed to him by the Appellant in the circumstances that led to the accident.

5. In rejoinder, the Respondent's counsel filed a cross appeal dated 27/01/2025 and raised the following grounds of appeal;

    i. The learned magistrate erred by holding the Respondent 50% liable despite the Appellant's uncontroverted evidence imputing liability on the appellant; disregarding the evidence adduced specifically the police officer who was the Plaintiff's witness and apportioned wholly blame for the accident on the Appellant and the police abstract on record indicating that the Appellant was to blame for the accident.

    ii. The learned magistrate erred by arriving at his decision based on the wrong principals of law governing the burden of proof of negligence and liability as well as assessment of quantum of damages, in that he failed to consider the pertinent issues of law and facts raised by the Respondent's counsel during the cross examination of the Respondent's witnesses and also in the Respondent's submissions.

    iii. The learned magistrate erred by failing to appreciate that the Appellant had failed to prove on a balance of probability that the Respondent was negligent for causing the accident yet it is the Respondent who had proved in evidence that the Respondent was the sole author of his own misfortune.

iv. The learned magistrate erred by failing to find that both the Respondent's and Appellant's police abstract blamed the rider of the motor cycle KMET 374W for causing the accident that was corroborated by the traffic police officer and therefore no negligence could be visited on the Respondent.

v. The learned magistrate erred by failing to consider receipts in support of Kshs.631,720/- as pleaded in the counterclaim were adduced in evidence without objection by the Respondent's counsel.

vi. The learned magistrate erred by awarding the Appellant a sum of Kshs.500,000/- as future medical expenses which amount had not been pleaded in the plaint nor witness statement and neither led into evidence by the Appellant in his evidence in chief.

vii. The learned magistrate relied on the Appellant's submissions despite the principle of law that submissions are not evidence on which a case is decided.

viii. The learned magistrate erred by awarding the Appellant a sum of Kshs.1,500,000/- in general damages, pain and suffering based on the wrong principles of law governing assessment of quantum of damages, in that he failed to consider the pertinent issues of law and facts raised by the Respondent's counsel during the cross examination of the Appellant's witness.

ix. The learned magistrate failed to apply himself judiciously and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

x. The learned magistrate erred in law and fact in neglecting to consider the whole of the Respondent's submissions.

6. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that the right leg that was crashed points to the direction of the motor vehicle and point of impact. That the abstract was filled while the Appellant was in hospital hence the Respondent had her way in influencing the record. That the officer who took over the matter testified that the accident happened at a junction next to Nanyuki Police station and wondered why the appellant was blamed for the accident. That the Respondent's evidence was inconsistent as she indicated in her pleadings that the accident happened near the bridge along the Likii river however during cross examination, she testified that it was before Nanyuki river.

7. That the injuries on the right leg and damage on the right side of the Respondent's vehicle coincided with the Appellant's testimony that the Respondent joined the road at a junction without observing the road sign thereby hitting the Appellant who had the right of way as he was heading to Nanyuki town and the trial court failed to put into consideration that the only person who could give a narrative of the events was the Respondent who after the accident was unconscious. That the recordings on the abstract were therefore made to exonerate the Respondent and that is why the sketch map was not produced. Therefore, the trial court erred by apportioning liability at 50:50 as he failed to consider the injuries on the right side which was a result of direct impact from the Respondent's motor vehicle. He also failed to consider that the Respondent mentioned two separate scenes of the accident.

8. He submitted that the trial court erred by awarding the Respondent Kshs.614,220/- in absence of a detailed assessor's report. That non-production of the assessor's report was against the established exception on the standard of proof of special damages in material damage claims. That in absence of the assessor's report, production of receipts could be the only option to warrant the court to grant the claim. The Respondent also produced the accident claim form giving the description of the extent

of damage whereas no report was produced to show those extent of damage and it would have been necessary for the assessor to detail the damages in a report. That the photos attached to Dexhibit 6 did not show the serious damage mentioned in the accident claim form as there was no shuttered windscreen, cracked engine and others. Additionally, the issue of the cracked engine was not raised in her statement but was only mentioned in the accident claim form and if the damage was that bad to the extent of cracking the engine, the photographs would have shown the same and the Respondent would have sustained injuries.

9. He submitted that the Respondent indicated that her insurer was seeking compensation under subrogation right from the Appellant however, she did not prove that she had brought the claim under a counter claim to prove subrogation rights. That her testimony did not establish that she had been indemnified by the insurer and that she had filed a counterclaim in order to realise subrogation rights of the insurer. No insurance agent was called to prove that compensation was made by the insurer for the repairs and in her statement, she did not mention anything on the subrogation rights. No relief related to subrogation was made apart from the insurance claim form. That the trial court ought to have dismissed the counterclaim for failure by the Respondent to prove special damages under material damage claim and failure to prove that she was eligible for compensation under the principle of subrogation.

10. He maintained that the trial court was wrong in apportioning liability since he was taken to hospital unconscious after the accident and when he was in that state, the Respondent was cleared by the police and they blamed him. That the police officer deliberately refused to draw a sketch plan for reasons that the plan would have shown that the Respondent was liable. Further awarding the Respondent Kshs.614,220/- was unjust enrichment because there was no evidence that such amount could be paid as compensation to the insurer as compensation under the subrogation rights. That the requirements under subrogation were not met hence it was erroneous to award the same. He maintained that the claim of Kshs.631,720/- was not proved by the Respondent as no receipts were produced as what was produced was a fee note and an invoice which are not proof of payment. He submitted that the award of Kshs.500,000/- for future medical expenses was not sufficient considering the doctor's testimony that he would likely to have several replacements. He urged the court to grant Kshs.1,500,000/- to fit at least three hip replacements.

11. In rejoinder, the Respondent's counsel submitted that the evidence of the traffic police confirmed that the Appellant was to be blamed for the accident as he acknowledged that both the Appellant's and Respondent's abstracts showed that the Appellant was to blame for the accident. That the Appellant was unable to collaborate his version of the events on how the accident happened and he acknowledged that the police abstract blamed him for the accident. He failed to demonstrate the particulars of negligence as pleaded and he could not confirm whether he had worn a helmet, reflective jacket and whether the motor cycle was insured. He further failed to demonstrate the claim of Kshs.500,000/- as future medical expenses as the same was not pleaded in the plaint nor in his statement. Additionally, the description of how the accident occurred failed to highlight the particulars of negligence and which contradicted the averments in the witness statement.

12. He submitted that the Appellant's testimony that was relied on at the trial was inconclusive hence the trial court was bereft of evidence to substantially deal with the issue of liability. That the Appellant failed to discharge the burden as he failed to prove the particulars of negligent acts attributed to the Respondent. As to the amount of Kshs.631,720/-, she submitted that she produced the receipts that confirmed the amount pleaded because she produced a copy of the fee note from the integrated motor assessors ltd, copy of invoice from Brijack Assessors ltd and a copy of re-inspection report from Brijack assessors ltd. He maintained that the Appellant negligently exposed himself by failing to comply with

traffic laws and regulations by riding at high speed disregarding other road users. He also failed to prove negligence on part of the Respondent hence his claim should be dismissed and the counterclaim allowed.

13. This is a first appeal and therefore the duty of this court is to satisfy itself whether the decision of the trial court was well founded. See Selle & Another v Associated Motor Boat & Co. Ltd. & Others (1968) EX 123, where this principle was well explained in the following manner;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

14. The evidence before the trial court was as follows;

The Appellant testified that on the material date, he dropped a customer at Makutano and on his way back, he met the Respondent at the junction at Nanyuki police station. She was driving from Likii direction to join the main road and she was not patient to allow him pass. That he was driving his motor cycle on the highway so he had the right of way. She did not stop to allow him pass so she knocked him from the right injuring his right leg. He lost consciousness and he was taken to hospital where he regained consciousness after one month. That he was stitched on the head, his right hand was dislocated entirely. His left leg was also injured but had healed. He underwent a surgery on the right leg and an X-ray was done on his head. CT scan was done on his legs and that since 2019, he has been in and out of hospital and had underwent 6 surgeries and he see his doctor on monthly basis. That due to the accident, he was forced to use spectacles. That it is painful during the cold weather and he cannot do anything for himself. The consultation is Kshs.3,000/- which is difficult to get and that he requires Kshs.1,500/- to travel to Nanyuki for therapy and he solicit contribution from family and friends. He produced the demand letter as Pexhibit1, log book for motor cycle as Pexhibit2, bundle of treatment notes as Pexhibit3, photographs as Pexhibit4, bundle of receipts as Pexhibit5, certificate of insurance as Pexhibit6.

15. On cross examination, he testified that the total bill at Consolata hospital was Kshs.599,274/- and NHIF paid Kshs.450,000/-. That he used to attend therapy once a week and that the therapy expenses was not pleaded. That the defendant was impatient and joined the highway when it was not clear. That she was supposed to give him way and that he was not trying to overtake. That he did not know whether the defendant was charged. That he was concentrating on the road hence he could not tell whether she had signalled and that he was wearing a helmet and a reflector jacket.

16. On re-examination, he testified that at the junction, there is a stop sign located on the side when approaching the main road. That he was not charged with a traffic offence.

17. PW2, Dr. Samuel Ndanya testified that he is a consultant orthopaedic and trauma surgeon with 21 years of experience. That he first attended to the appellant at Huruma hospital after the accident and had seen him severally and operated on his right hip. That he was still seeing him. That among the injuries he sustained were severe head injury which was treated and healed over time. He had right hip and lower limb injury and had over five operations in different hospitals with the last one being total hip replacement which he conducted at Consolata mission hospital. The other injury was nerve lower limb which is permanent. For the hip injury, the artificial hip joint will wear out in 5 years. That he still relies on clutches to walk and he has weakness on his right lower limb and has foot drop hence he cannot

lift his foot while walking. He produced the medical report as Pexhibit7, the x-rays as Pexhibit8(a)-(d). He testified that it was a severe injury so they did the operation in 2 stages. That the Appellant may have head complications due to severe head injuries and that in 100 years, he is likely to have more than 5 operations and is likely to rely on clutches for the rest of his life. That he is likely to have several hip replacements as the younger the person is, the expensive the hip replacement is and especially in mission hospitals, the cost is Kshs.500,000/-.

18. On cross examination, he testified that the Appellant had been seen by many other doctors. The receipt he issued had revenue stamps. That the artificial hip will wear out and that he did not assess his disability in his report. That the appellant is totally incapacitated.

19. PW3 PC Boniface Mwangi testified that the investigating officer was on transfer but he took over the matter from the previous investigating officer. He produced the police abstract dated 09/05/2020. He testified that the accident was along Meru Nanyuki road near Likii and that the injuries sustained by the victim were serious. The matter was reported at Nanyuki police station. That the junction which was the scene is next to Nanyuki police station. He also produced the defence abstract dated 17/09/2020 as Dexhibit1.

20. On cross examination, he testified that he was not aware of any other abstract and he could not trace the occurrence book for the accident. That the rider of the motor cycle was to blame and nobody was charged for the accident.

21. On re-examination, he testified that the rider was to be blamed for the accident and that according to the abstract, the accident happened at the junction. That he did not know why the rider was blamed. That he did not know whether the driver was charged with the accident.

22. DW1, the Respondent testified that she had 20 years driving experience and had never been charged with any traffic offence. That the rider was blamed for the accident in both abstracts. She sought compensation for the repairs amounting to Kshs.631,720/-. She produced copy of motor vehicle record as Pexhibit1, police abstract as Dexhibit2, motor vehicle insurance claim as Dexhibit3, copy of fee note from integrated motor assessor limited as Dexhibit4, copy of invoice from Brijack assessed limited as Dexhibit5 and copy of inspection report as Dexhibit 6.

23. On cross examination, she testified that she was driving from Nanyuki to Katheri and she met the Plaintiff just before Nanyuki river who was overtaking a vehicle ahead. That she did not capture the description of the motor vehicle he was overtaking. He was in the process of overtaking the lorry and he hit her vehicle not the other way. That she could not recall if the lorry stopped. The impact was on the front part of the right side of her vehicle and the wheel was damaged making the vehicle immobile. The right fog light and headlight were damaged on impact. That she stopped at the scene and she could not recall if the Plaintiff was injured. She did not help the Plaintiff as she was confused at the material time. That any invoice is proof of payment and she did not produce the receipts which must be present. That she was not joining the highway when the accident happened.

24. On re-examination, she testified that the damage was assessed and confirmed as per Pexhibit6. That the scene was before crossing the river.

25. That was the totality of evidence before the trial court. The issues for determination are on liability and on award of damages.

Liability

26. As seen earlier, the trial court apportioned liability in the ratio of 50:50 on both parties. While doing so, the trial court observed that even if the abstract indicated that PW1 was to blame for the accident,

the said abstract was not conclusive proof of liability in absence of evidence being called to support it and he relied on several cases. He held that PW3 was not the investigating officer and the sketch plan was not produced which could have corroborated either party's positions hence he did not assist either parties' case. Based on the above, he held that there were two conflicting evidence on how the accident occurred and in such instances, the correct position is to split the blame equally between the two drivers and he relied on the case of Hussein Omar Farah v Lento agencies (2006) eKLR among other cases.

27. Indeed, the two abstracts blamed the Appellant for causing the accident. But I hold, as the trial court did that an abstract is not conclusive proof of how the accident happened and is just proof that an accident was reported as was held in Peter Kanithi Kimunya v Aden Guyo Haro (2014) eKLR thus;

> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station."

28. Furthermore, the appellant was not charged with any traffic offence and Dexhibit1 indicated that the case was pending under investigations. No other documentary evidence was produced to show how the accident happened and who was on the wrong.

29. That said, proof of negligence is a matter of evidence on the occurrence of the incident. This position is in fact mirrored by the court in Treadsetters Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR, Ibrahim, J (as he then was) cited Charlesworth & Percy on Negligence, 9th Edition at pg. 387 in which it is stated that:

> " In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

30. In Nandwa v. Kenya Kazi Ltd (1988) KLR, 488 as cited by Koome, J in Regina Wangechi v. Eldoret Express Company Ltd (2008) eKLR it was held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the Defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

31. It is an established fact that a collision occurred. The question that this Court must grapple with is who among the Appellant and the Respondent was to blame for the collision.

32. The trial court made a finding that the parties herein gave conflicting evidence on how the accident occurred. The Appellant testified that the scene was at the junction that is near Nanyuki police station. In his witness statement, he stated that he was riding his motor cycle along Meru-Nanyuki Highway when the Respondent carelessly drove her motor vehicle into the junction without due regard of his presence. He testified in court that he was from Makutano and at the junction near the Nanyuki police station, the Respondent was driving form Likii direction and she did not stop to allow him pass since he was riding on the highway hence he had the right of way. The Respondent therefore knocked him from the right injuring his right leg. He maintained on cross examination that the Respondent joined

the highway when it was not clear and she was supposed to give him way. He denied that he was trying to overtake when the accident occurred.

33. The Respondent's version on the other hand was that the Appellant was overtaking and hence he rammed onto her vehicle. In her counterclaim, it was stated that she was heading towards Makutano and as she approached Likii river bridge, the Appellant recklessly rode the motorcycle and caused it to collide and ram into her vehicle. The rider hit her car and was seriously injured.

34. She denied that she was joining the high way when the accident occurred. Further, in her witness statement, she stated that the rider of the motor cycle was seriously injured and rushed to hospital whereas in her testimony in court, she testified that she could not recall if the Plaintiff was injured.

35. I have re-evaluated the evidence herein. The core question here is whether the evidence by the Appellant established that the Respondent was 100% liable for the accident. From the evidence on record, it is clear there is no contest that the accident occurred. There is no contest that the deceased sustained injuries and the vehicle involved damaged. What is contested is who was to blame for the accident. The testimony of the Appellant and PW3 is called in support of the Appellant's case. There is no independent witness called to assist the trial court in determining the exact acts or omissions on the part of the rider and the driver. PW3, the police officer who produced a police abstract was not helpful to the court. He was not the investigating officer. He had no sketch plan of the scene. Indeed, he knew nothing about the causation of the collision.

36. The Respondent relied on yet another police abstract which also placed blame on the Appellant. It is manifestly clear that the handling of this case by the traffic policemen involved left a lot to be desired. The court is left without tangible evidence upon which to apportion blame for the Accident on one party and not the other.

37. On the evidence on record, it was not possible to state with any degree of certainty that it was the Appellant or the respondent to blame for the Accident. The police abstract is not enough a piece of evidence to apportion blame on the Appellant.

38. The trial court in my view appreciated the law on the degree of proof in a negligence claim and the applicable principle where neither party proves negligence on the other and was properly guided by the decisions of our superior courts on the matter.

39. In the persuasive decision of Peter Kanithi Kimunya v remarked;

Aden Guyo Haro [2014] KEHC 1547 (KLR), the court

> " There being no eyewitness to this accident, the onus of proving how the accident occurred and how negligent the respondent was never shifted to the respondent and that is the purport of Section 107(1) of the *Evidence Act*. Similarly, if the defendant was alleging that it was the plaintiff to blame for the occurrence of the accident, then it was upon him to prove that fact. In my view, Sections 109 and 112 of the *Evidence Act* are not inconsistent with Section 107 thereof but compliment the latter on the adage "he who asserts must prove".

40. Both parties in this appeal pleaded negligence against each other. Save to the confirmation that a collision occurred, none of the parties proved negligence attributable only to the other. They were bound so to do under Section 107 of the *Evidence Act*.

41. As stated above, there were specific acts of negligence absence of evidence being called to support it abstract would not be conclusive proof of liability in the indicated the person to blame for the accident, the said the point of impact. Even if the police abstract had probabilities. There was no independent

witness to the Accident. No sketch of accident was produced to prove proving the said allegations lay on both, on a balance of pleaded by both parties in their pleadings and the onus of

42. The Court of Appeal in Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four by Four Safaris Company Ltd. [2004] KECA 65 (KLR) when faced with a similar situation remarked thus:

> " There is no doubt that an accident occurred between the two vehicles on the Nyeri – Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50."

43. The Court of Appeal, again in a situation similar to the one subsisting in this case in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR, and it held as follows:

> " It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

44. In the circumstance, I apportion liability for the accident at 50:50 as the evidence is unclear on who is responsible for the accident.

45. The Appellant challenges the award of special damages of Khs. 614,000. It is submitted that what was required was the production of an Assessor's report. I have confirmed from the record that what was produced as DEXH 6 is an Inspection Report and not a detailed Assessors report. It was necessary for the Respondent to prove by evidence the actual assessed damages to her vehicle even without necessary producing receipts to prove payment for the repairs.

46. The trial court despite relying on legal precedent from the court of Appeal, which authorities bear repeating here, fell into error when it concluded that DEXH 6 was an Assessors Report when in actual fact it was just an inspection report. In Nkuene Dairy Farmers Co-operative Society & A.nor v Ngacha Ndeiya {£010) eKLR, the Court of Appeal held-:

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

47. The said Court in David Bagine v Martin Bundi {1996) eKLR, in asserting the probative value of an assessor's report expressed itself thus;

> " The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim"

48. While the trial court correctly appreciated the law when it stated that the defendant only needed to prove the extent of the damage to her motor vehicle and what it would cost to repair it without necessarily proving that the repairs were actually done and paid for, the court missed the point that

the extents of such damages needed confirmation by a motor vehicle Assessor. The claim in this head of special damages fails.

Quantum

49. In its memorandum of Appeal, the Respondent faults the trial court for applying the wrong principles of law governing the assessment of damages. That contention has not been elucidated in the submissions made and it remains a bare assertion.

50. That said, it is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of Butt v. Khan [1981] KLR 349 where Law, J.A stated that:

> " An appellate court will not disturb an award of damages unless it is 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."

51. No ground at all has been laid to warrant the court to disturb the award of general damages by the trial court.

52. As regards the award of damages for future medical expenses, the Appellant maintains that the award of Kshs.500,000/- was not sufficient considering the doctor's testimony that he would be likely to have several hip replacements. He urged the court to award Kshs.1,500,000/- to fit at least three hip replacements. The Respondent on the other hand argued that the appellant failed to demonstrate the claim of Kshs.500,000/- as future medical expenses as the same was not pleaded in the plaint nor in his statement.

53. The trial court while awarding Kshs.500,000/- observed that future medical expenses must be specifically pleaded but also appreciated while relying on a plethora of authorities that a court may determine unpleaded issue where evidence is led by the parties and relied on the evidence of PW2 that the Appellant will require several hip replacements at a cost is Kshs.500,000/-. He held that there being no contrary evidence, future medical expense was established at Kshs.500,000/-.

54. In the amended plaint, one of the prayers sought by the Appellant was compensation for future medical expenses though the amount was not indicated. It is a fact of life that future medical expenses though a special damage is not a static one and is prone to variations based on a patient's progress in healing and therefore poses serious challenges in specificity of amounts claimed. It is enough to plead a claim for future medical expenses without necessarily specifying actual amounts which as stated above could vary and must be left to proof by way of evidence.

55. Am fortified in this finding by the holding by the Court of Appeal in Tracom Limited & another v Hassan Mohamed Adan [2009] KECA 48 (KLR) where the court held;

> " We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v. Gituma (2004) 1 EA 91, this Court, stated:-
>
> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.

That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require. In the matter before us the respondent in his plaint stated at paragraph 5 as follows:-

"As a result of the aforesaid accident the plaintiff sustained injuries and has suffered loss and damages."

And at paragraph 6 of the same plaint, the respondent went on and stated:

"Particulars Of Special Damage

(a) Medical Report Ksh.1,500/=

(b) Police Abstract Ksh. 100/=

(c) Full particulars to be supplied at the hearing hereof.

(d) Cost of future medical expenses to be ascertained after professional consultation with his doctors.

And the plaintiff claims damages."

Thus in our view, the respondent clearly pleaded that he would claim future medical expenses and he stated that the quantum of that claim would be availed after it was ascertained.....Thus, in the body of the plaint, the respondent pleaded cost of future medical expenses and averred that the same would be ascertained later. In the prayers, the respondent prayed for special damages and general damages, and interest on the two. The learned Judge of the superior court found that this head was properly pleaded. We have no reason to fault him on that aspect. The appellant was warned in good time by the pleadings at paragraphs 5, and 6 of the plaint together with the prayer for that award. Further, the respondent's counsel also stated before hearing, that she would address the court on that claim and the appellants then counsel readily responded and said they had agreed on that issue. In law, that issue was plainly before the court and the court had a duty to decide on it even if it had not been so specifically pleaded as was here. In the well known case of Galaxy Paints Co. Ltd v. Falcon Guards Ltd (2000) 2 EA 385, this Court stated:-

"It is trite law, and the provisions of Order X1V of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues

> arising from the pleadings or such issue as the parties have framed for the Court's determination."(Underlining supplied).
>
> See also the case of Odd jobs v. Mubia (1970) EA 476.
>
> As we have stated, in this matter we are certain that the issue of future medical expenses was pleaded but we add that even if it had not been pleaded, it was an issue framed by parties and left to the court to make a decision on. The court properly did so. What we have stated only concerns whether it was pleaded or not and whether the court could decide on it."

56. As stated above, the cost for future medical expenses was pleaded in the amended plaint and was proved by the evidence of PW2. The issue was rightly before the trial court.

57. I also do not fault the trial court award of Kshs.500,000/- as future medical expense reason being PW2 testified that the Appellant will require several hip replacements and in mission hospital, the cost is Kshs.500,000/-. He did not specify whether this was for one hip replacement or for several hip replacements.

58. With the results that the Appeal succeeds and the Cross Appeal fails to the extent aforesaid and I make the following orders;

    a. The Judgement of the trial court entered in favour of the Respondent in respect of the counterclaim is hereby set aside and substituted with an order dismissing the counter claim with costs to the Appellant.

    b. Judgement on liability is upheld as apportioned at 50:50 or equally.

    c. The Appellant is awarded general damages at Kshs 1,500,000 less 50% contribution with interest from date of judgement.

    d. The Appellant is awarded Special damages of 171,344 less 50% contribution with interest from the date of filing suit.

    e. The Appellant shall have 75% the costs of this appeal and full costs at the lower court.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

A.K. NDUNG'U

JUDGE