

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CIVIL APPEAL NO. E022 OF 2024**

**MESHACK OTIENO SUMBA..... 1<sup>ST</sup>**  
**APPELLANT**

**CHARLES NEW NYAMOTE..... 2<sup>ND</sup>**  
**APPELLANT**

**HABARI NJEMA SACCO SOCIETY LTD..... 3<sup>RD</sup>**  
**APPELLANT**

**-VERSUS-**

**JUDITH ONYANGO OBANO.....**  
**RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. Naomi Wairimu, SPM dated 3.9.2024 arising from Migori CMCC No. 71 of 2019.
2. The Appellant lodged a memorandum of appeal against both liability and the award of general damages.
3. The Plaintiff dated 29.3.2019 claimed damages arising from an accident that occurred on 27.12.2017. The accident involved the Respondent while a passenger on motor vehicle registration no. KBA 288N along Migori-Awendo Road when the Appellant's Motor Vehicle Registration when negligently

driven and caused an accident in which the Respondent sustained personal injuries.

4. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Ksh. 6,550/= as Special Damages and also pleaded General Damages. The injuries were pleaded as follows:

- (i) Cut wound to the neck
- (ii) Soft tissue injury to the head
- (iii) Soft tissue injury to the abdomen
- (iv) Deep cut wound to the left arm
- (v) Contusion to the chest.

5. The Appellants entered appearance and filed amended Defence dated 11.12.2020 denying the particulars of negligence and injuries pleaded in the Plaint. The Appellants also introduced allegations on fraud and forgery in the medical documents relied on by the Respondent.

6. The Trial Court heard the parties and proceeded to render Judgement awarding liability at 100% against the Appellants and general damages of Ksh. 300,000. The court also awarded special damages of Ksh. 6,550. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

## **Evidence**

7. During the hearing, PW1 was the Respondent. he testified and produced his evidence. The bus in which they were travelling had 60 passengers. She lost her child one year 3 months in the accident. her daughter and nephew also suffered injuries in the accident. the bus was moving at high speed prior to the accident.
8. PW2 was the traffic police officer. He produced the police abstract. The accident occurred when the bus brushed against a tractor. He was not investigating officer. He relied on OB no. 4/26/12.2017.
9. PW3 was the clinical officer from Migori County Referral Hospital. The Respondent was treated for cut wound on the neck, soft tissue injuries on the head, tenderness to the abdomen deep cut wound to the left upper arm and restricted shoulder movement. She produced treatment notes and P3 Form.
10. PW4 was Dr. Aggrey Idagiza Akidiva. He categorized the injuries as soft tissue injuries.
11. On his part, the Appellants testified as DW1, Dr. Ian Omuom. He was not able to confirm that the treatment notes originated from Migori County Referral Hospital where he worked.

### **Submissions**

12. The Appellant filed submissions dated 7.1.2026. It was submitted that the Appellant proved that the 1<sup>st</sup> Respondent was not involved in the accident and the Appellants were not liable. Reliance was placed on Section 107 of the Evidence Act.
13. It was also submitted that the police abstract was obtained fraudulently and the Appellant proved so. They relied on **Caroline Waithira Kago v Stephen Muiruri Njau** (2016) e KLR.
14. Further, the Appellant submitted that the medical evidence tendered by the Respondent was not authentic and ought to have been rejected.
15. On quantum, it was submitted that the award of Ksh. 300,000/= was excessive and Ksh. 80,000 would have sufficed. Reliance was placed inter alia on the cases of **Indicho v Mosigisi** (2025) eKLR where it was submitted that Ksh. 120,000 was awarded for similar injuries.
16. Further reliance was placed on **HB Minor suing through mother and next friend v Jasber Nchinga Magari** (2021) eKLR where it was submitted Ksh. 60,000 was awarded for similar injuries.

17. The Respondent filed submissions dated 19.12.2025. it was submitted that the Respondent proved her case on a balance of probabilities. she cited section 107 of the Evidence Act.
18. It was also submitted that any allegations of fraud in the Respondent's medical records were not proved. She relied inter alia on **Teleposta Pension Scheme Registered Trustees v Intercountry Importers and Exporters & 4 Others** 92016) e KLR.
19. It was submitted that the Appellant's defence remained mere allegations as no witness was called. Reliance was placed on **National Bank of Kenya v Ebenezer Electronics and Communications Limited & 3 Other** (2008)e KLR.
20. On quantum, it was submitted that the award of Ksh.300,000/= was not inordinately high. That there was no basis to interfere with the discretion of the lower court in the award. She cited inter alia the case of Joseph Ndirangu v Attorney General CA No. 83 of 1991.

### **Analysis**

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

22. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

23. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others** [1968]EA 123, where the court in their usual gusto, held as follows;-

“.. 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 re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the

impression of demeanour of a witness is inconsistent with the evidence generally.”

24. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

25. This court’s **the jurisdiction to review the evidence should be exercised with caution.** In the cases of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows: -

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

26. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

27. The Appellants urged the court to find that the lower court erred in finding him 100% liable the accident. On the other hand, the Respondent's general case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.

28. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

**“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”**

29. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending

on the circumstances of the case. In Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

**“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

**“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

31. The balance of probabilities is also about what is likely to have happened than the other. In Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

**“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the**

**allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”**

32. Furthermore, the standard of proof in civil cases **must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities.** In **Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

**“Denning J, in Miller -vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-**

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.**

**This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other**

**which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”**

33. The Respondent herein was a passenger in the accident motorvehicle. It was her case that the motorvehicle was driven at a high speed and it caused an accident in which she suffered injuries. In my revaluation of the evidence and testimonies in the lower court, the Respondent was not to blame in any way. The Respondent thus proved that it is the Appellant who was 100% to blame for the accident. Where the Respondent as Plaintiff in the lower court proved his case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view he failed. In the case of **Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431** the court held that; -

*“In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence”.*

34. There could be no liability without fault on the part of the Respondent as passenger. In the case of **Kiema Muthuku v Kenya Cargo Handling Services Ltd** (1991) 2 KAR 258, the court of appeal posited as doth:

There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

35. Therefore, the Respondent proved want of care on the part of the driver of the accident motorvehicle. I am in consonance with the reasoning of the Court in the case of **Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR** where Nyakundi J referred to **Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan**, and held as follows:

“In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In *Nance v British Columbia Electric Rly* [1951] AC 601, at page 611, Lord Simon said:

“.....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to

prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

36. Further, the Appellants failed to call a driver witness and the case of the Plaintiff was largely uncontroverted. The allegations in the defence were mere averments not substantiated. In the case of **Janet Kaphiphe Ouma & Another -vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007**, Ali Aroni, J citing the decision in **Edward Muriga suing through Stanley Muriga -vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997** that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or

pleads must support the same by way of evidence.”

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.”

37. On quantum, the lower court granted an award of Kshs. 300,000/- in general damages. The court did not indicate any authority as basis for the award. The Appellant suffered the following injuries:

- (i) Cut wound to the neck
- (ii) Soft tissue injury to the head
- (iii) Soft tissue injury to the abdomen
- (iv) Deep cut wound to the left arm
- (v) Contusion to the chest.

38. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Aggrey Akidiva dated 3.3.2018 and the treatment note produced by PW3. The Appellants’ witness, DW1 on the other hand did not appear to support or propose any injuries as he disputed the source of the treatment notes and its authors. There was however no evidence based on which fraud or forgery would be inferred and the same was also not proved.

The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR** where the court stated that

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‘It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by

the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

39. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved on evidence.
40. Therefore, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there 29.12.2020. will be disparity in awards made by different courts for similar injuries as established in **Southern Engineering Company Ltd. vs. Musingi Mutia** Civil Appeal No 46 of 1983 [1985]

eKLR. However, the Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that “*comparable injuries should attract comparable awards*”

41. The principle on the award of damages is settled. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another** [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.

42. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000** where the Court of Appeal stated as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

43. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in **Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR** as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

44. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, **Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713** at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

"I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available

come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

45. The words of Lord Denning were reiterated by Nyarangi, JA. in **Kigaragari v Aya** [1985] eKLR thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

46. Further, in the case of **Kilda Osbourne v George Bamed and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294** being guided by the principles enunciated by both Lord Morris and Lord Devlin in **H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625** Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The

actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

47. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of **H. West and Son Ltd v. Shepherd [1964] AC.326** (supra) where it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

48. With the above guide, if the Award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.
49. I proceed to determine similar fact cases in relation to damages as applicable this Appeal. Therefore, I find the following cases to present similar fact situation to the Appeal herein.
50. In **Duncan Mwenda & 2 others v Silas Kinyua Kithela** [2018] eKLR, the Plaintiff suffered severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. The Court awarded Kshs. 350,000/- in General Damages. The Appellant relied on this case in the Trial Court.
51. In **Francis Ochieng and Another v Alice Kajimba** MGR HCCA No. 23 of 2014 [2015] eKLR, the Plaintiff sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, loss of 5 anterior lower and two upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. The court held that an award of Kshs. 350,000/- was awarded in 2015.

52. The injuries in the above two cases are slightly more severe than in this case. In **Mulwa & Another v Nzai (Civil Appeal E072 of 2023) [2024] KEHC 6898 (KLR) (10 June 2024) (Judgment)** the court awarded Kshs. 250,000 reduced from the lower court's award of Ksh. 400,000 for the Plaintiff who had suffered the following injuries: a. Small bruise on the right ankle. b. Soft tissue injuries on lower back and right lower limb. c. Blunt object injury to the lower and right limb d. bruises on the right lower limb.

53. All these authorities show that the Award of Kshs. 300,000/= was not inordinately high as to be termed as manifestly excessive and erroneous estimate. The Award of Ksh. 300,000/- was in my view adequate compensation taking into regard the passage of time and inflation.

54. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

**“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result**

**from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”**

55. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past

expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities...Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of

the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly... Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

56. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 6,550/= which the lower court adopted as proved. I allow it.

57. In the upshot, I make the following orders: -

- (a) The Appeal on liability is dismissed.
- (b) The Appeal against the award of damages is dismissed.
- (c) The Respondent shall have the cost of this appeal assessed at Ksh. 55, 000/=.
- (d) The File is Closed.

**DELIVERED, DATED and SIGNED at NYERI, virtually on this 9<sup>th</sup> day of March, 2026.** Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Mr. Abisai for the Respondent  
No Appearance for the Appellant  
Court Assistant- Michael