P.J. Dave Flowers Limited v Barasa (Appeal 25 of 2018)
[2023] KEELRC 3320 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3320 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 25 OF 2018

K OCHARO, J

NOVEMBER 23, 2023

BETWEEN

P.J. DAVE FLOWERS LIMITED ..... APPELLANT

AND

ONYANGO CHARLES BARASA ..... RESPONDENT

(Being an appeal against the Decree and Judgment delivered on 23rd January 2018 by Hon. M. Chesang (RM) in Kajiado CMCC Suit No. 375 of 2016)

JUDGMENT

Introduction

1. The appeal herein which has been commenced vide a Memorandum of Appeal dated 15th February 2018 challenges the Judgment and Decree of the Honorable Resident Magistrate in the above-mentioned cause, on the principal grounds that she erred in law and fact;

   (a) By failing to consider at all the submissions made before her by the Defendant thereby reaching an erroneous conclusion and occasioning a miscarriage of justice;

   [b]. By awarding general damages of Kshs. 200,000/- when the same was not proved;

   [c]. By taking into account irrelevant factors and wrong principles in assessing the quantum of damages hence arriving at a wrong, and making an excessive, award on the quantum of damages;

   [d]. By failing to appreciate and consider the evidence before her and finding the Defendant 100% liable.

2. The Appellant consequently sought that: -

   1. This Appeal be allowed.

2. That the Judgment and Orders of the subordinate court dated 16th January 2018 be set aside.

3. That costs of this Appeal be borne by the Respondent.

3. When the matter came up for directions on 7th February 2023, this Court ordered that the appeal be canvassed by way of written submissions. The parties obliged the directions. Their submissions are on record.

The case before the Trial Court

4. The suit before the Trial Court was founded on the tort of negligence and breach of duty of care. The suit was initiated through a plaint dated 5th April 2016. In the plaint, the Respondent herein averred that he was an employee of the Appellant herein as a supervisor at all material times. Further, in the course of his employment, he was exposed to excessive cold and chemicals. As a result of the exposure, he suffered a serious respiratory tract infection. The Respondent blamed the negative effect on his health on the failure of the Appellant to discharge its contractual duty of care towards him, specifically not to expose him to risk of damage or injury. The Appellant failed to provide him with protective apparatus, maintain a safe place of work, and provide and maintain a proper and safe system of work.

5. On its part, the Appellant herein resisted the Respondent's claim through a Statement of Defence dated 23rd August 2016 wherein it denied that the Respondent was its employee; and that it was negligent and/or breached any contractual obligation and or duty of care. The Respondent contended further that if the Respondent suffered the illness alleged, the same was a result of negligence on his part. He failed to; follow the laid down precautions; wear any protective gear which had been provided to him; and expose himself to the risk of being injured knowingly or when he ought to have known.

6. In his evidence before the Learned Trial magistrate, the Appellant testified that he first came into the employment of the Appellant in 2008 as a senior supervisor in the grading/pack house department. On or about March 2014, he developed chest problems like coughing, and chest pains which though not serious seemed to be perpetual and not responding to medication.

7. Over time, more symptoms such as difficulties in breathing manifested. The Appellant's doctor confirmed that the condition was becoming serious and referred the Respondent to Kajiado Hospital for advanced checkups. Upon attending Kajiado Hospital on 7th July 2015, he was diagnosed with a serious respiratory tract infection due to the exposure to cold and chemicals at the workplace. On 8th July 2015, the Respondent was treated at Manna Medical Centre and discharged on the same day.

8. During cross examination, the Respondent confirmed that he worked in the grading department, but would enter the cold room at 5 pm to supervise. That although he was a supervisor, he had no office. He also stated that he was only given a dust coat as protective gear.

9. In evidence, the Appellant postulated that the Respondent never attended at the Company clinic on the alleged day of the accident; took a one-day leave, rather than sick off on the day that he alleged to have gone to Kajiado Hospital per the Master Roll; was on duty on the day that he alleged to have been treated at Manna Medical Centre per the Muster Roll; and signed a declaration dated 30th September 2016 confirming that he never suffered any injuries during the course of employment with the Appellant. Further, the Appellant insisted that no occupational accident was ever reported by the Respondent.

10. During the oral hearing of the case, the Appellant's witness, one JUDY SAMBAI testified that the Respondent worked in the grading department, and was not one of the people who worked in the cold room, as he was in senior management. On cross-examination, the Appellant's witness confirmed that

she had only worked for the Appellant for 2 years. She further reiterated that the Respondent did not go to the clinic on the 8th July 2015, but conceded that the leave form showing the Respondent had gone on leave on the 7th July 2015 as averred by the Appellant was not produced in Court, neither were the records of Manna Clinic investigated. The witness was emphatic that the Respondent was given protective gear. She testified that she was not aware of any complications sustained by him during his employment.

11. After hearing both the Appellant's and the Respondent's witnesses on their respective cases, the Learned Magistrate pronounced herself on the matter on 23rd January 2018. In her judgment, the Learned Magistrate held that the Respondent had proved that he suffered an injury, namely, chemical pneumonitis, in the course of his employment, which was corroborated by the medical report dated 16th February 2016, and treatment notes dated 8th July 2015. The Learned Magistrate returned that the Appellant had not proved his claim that the Respondent did not work in the cold room by attaching an allocation roster or payslip indicating the Respondent's exact workstation. She stated that the muster roll which was produced was irrelevant in terms of proving the Appellant's case.

12. In the end, the Learned Magistrate apportioned 100% liability to the Appellant; and awarded the Respondent General Damages of Kshs. 200,000/- and Special Damages as pleaded and proved.

The Appeal.

13. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out hereinabove.

Appellant's Submissions

14. In its written submissions dated 23rd March 2023, the Appellant argued that the Respondent worked as a senior manager whose duties did not entail working out in the field or the cold rooms. His duties were limited to supervision in the grading department. At the commencement of his employment with the Appellant, the Respondent was provided with protective equipment to enable him to discharge his duties. That this equipment was renewed annually or when it wore out, a fact confirmed by the Respondent during cross-examination.

15. It was the Appellant's submission that the Respondent did not discharge his evidential burden under Sections 107 and 109 of the *Evidence Act* Cap 80 of the Laws of Kenya to show that he was injured while within the Defendant's premises. The Muster Roll, which is a record kept by the Appellant of all employees present at all material times, and which was produced as evidence before the Trial Court, showed that the Plaintiff was not present in July 2015, and no accident was reported on the material day. The Appellant concluded that the Learned Magistrate erred in finding that the muster roll was not relevant in proving the Appellant's case.

16. It was submitted by the Appellant that the Respondent did not give particulars of the harmful chemicals to which he was exposed in the course of his employment. He did not call any witnesses to corroborate his assertions that he was exposed to chemicals in the course of his duties within the Appellant's premises and that the Appellant was negligent. Consequently, he did not discharge his evidential burden Under Sections 107 and 109 of the *Evidence Act* Cap 80 of the Laws of Kenya.

17. The Appellant cites the case of Homegrown (K) Limited vs Hannah Wairimu HCCC No. 68 of 1999 to buttress his submissions that the Respondent needed to identify and specifically set forth the chemicals that affected the him through expert evidence and a scientific basis. The Medical Report of Dr. Titus Ndeti does not state what kind of chemicals the Respondent was exposed to and whether the

same originated from the Appellant's premises. It only states that he sustained chemical pneumonitis due to exposure to chemicals and the cold.

18. The Appellant argued that though the employer bears the duty to ensure the safety, health and welfare of all persons working in his workplace under Section 6 (1) of the *Occupational Safety and Health Act*, he or she will not always be liable in every circumstance where an employee is injured at the workplace. Reliance was placed on the case of Purity Wambui Murithii vs Highlands Mineral Water Co. Ltd [2015] eKLR.

19. The Appellant submitted that it rebutted the Respondent's evidence that he was not provided with protective gear. It showed and proved that he was issued with a dust coat for wearing in the course of his employment in the grading department. The coat could be replaced annually. The Respondent himself admitted to this fact in his evidence under cross-examination. Further, the Respondent was not assigned to the cold room, and reasonably therefore it was unreasonable for the Respondent to assert that he could have been given protective equipment similar to those of cold room employees.

20. On quantum, the Appellant submitted that in the absence of conclusive medical evidence that he was affected by chemicals, the Respondent did not prove that he suffered the harm due to the alleged conditions. Further, the treatment notes from Kajiado Hospital did not state that he was being treated there following the effect of exposure to chemicals on him. As a result, his evidence did not meet the threshold set in Homegrown (K) Ltd (Supra).

21. Without prejudice to their above submissions, the Appellant this Court to be persuaded by the award of the case of George Morara Masitsa vs Texplast Industries Limited [2015] eKLR, KShs 90,000, as the harm that was suffered by the plaintiff therein is comparable to that suffered by the Respondent herein. The Trial Court's award of Kshs. 200,000/- was excessive and not based on any comparable award and therefore should be set aside.

Respondent's Submissions

22. The Respondent submitted that there are only two issues that present themselves for determination in this appeal. First, whether the learned trial magistrate applied the correct principles of law and available facts in the assessment of damages payable to the Respondent. Second, whether the learned trial magistrate's determination on the amount payable to the Respondent was inordinately high as to present an entirely erroneous estimate of compensation to which the Respondent was entitled.

23. It was submitted that the Appellant did not deny that the Respondent was its employee. Further, it did not refute his evidence that he was not issued with protective apparel, save for a dust coat, by producing documentation proving the issuance of protective equipment. Protective gear which would have prevented or diminished the chances of Respondent's risk to ill health.

24. The Appellant's witness's evidence was anchored on hearsay and misinformation from the Appellant. She first came into the employment of the Appellant long after the Respondent had suffered the infection.

25. The infection is a thing that occurs within a day. It did over some time. Therefore, the Appellant's submissions that the Respondent was not on duty in July 2015 and that Master Roll demonstrated this, were not helpful to the Appellant's case. The Learned trial Magistrate was right in holding that production of the roll was irrelevant.

26. The Respondent further submitted that considering the ill health he suffered, the decided cases that he placed before the Subordinate Court, Paul Gakune Mwinga vs Nakuru Industries Limited [2009]

eKLR Civil Case 679 of 1994, it cannot be difficult to conclude that the award by the Trial Court on general damages wasn't excessive. This Court can therefore have no reason to disturb the award.

Analysis and Determination

27. The Appeal before this Court emanates from a judgment of the Lower Court. It is now trite, that the role of a first Appellate Court is to subject the evidence and material that were placed before the trial court to fresh scrutiny, allowing it to come to its own independent findings and conclusions. This position was aptly elaborated in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123) where the Court held: -

> " An appeal to this Court from a trial by the High 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. In particular, this court is not necessarily bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

28. In The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

29. Bearing in mind its mandate as aforesaid, this Court has carefully considered and analyzed the evidence that was placed before the Learned trial Magistrate, the submissions filed by both parties and authorities relied on and notes that the grounds of appeal as brought out in the Memorandum of Appeal were unnecessarily, over split and repetitive, something which affronts the cannons of good draftsmanship of memorandums and petitions of appeal, and which carries with it the risk of a blurred analysis of the same by the Court charged with the responsibility to. Counsel and litigants alike should be worried of the risk.

30. With great respect to the Learned trial Magistrate, the judgment missed out on a pivotal component, identification of the issues that emerged for determination in the case before him and consequently the determination thereon and the reasons therefore. Identification of issues for determination by the Court sends out the deserved impression that the Court appreciated the dispute before it fully and

helps the Court to render a reasoned and concise judgment. It is a practice that should be embraced by all the Courts.

31. Having stated as I have hereinabove, I now turn to the grounds of appeal. The Appellant complains that the Learned trial Magistrate failed to consider its submissions fully, therefore reaching an erroneous conclusion, and thereby occasioning a miscarriage of justice. I have carefully analyzed the lower court's judgment, true there is no mention that the submissions by the parties were considered. However, without appearing to encourage Lower Courts to ignore considering submissions by the parties, a failure to consider them, will more often than not, not lead to setting aside the judgment on appeal.

32. Considering this Court's role as a first Appellate Court, I am not convinced that the unexplained failure by the Learned Magistrate can be a ground to unseat the judgment assailed in this appeal.

33. Grounds 2,3, and 4 of the memorandum of appeal, assails the Lower Court's decision on quantum. This Court will look at and consider them as a single ground. By so doing, the Court shall answer the question, thus, whether the learned trial magistrate erred in law and fact by awarding the Respondent general damages of Kenya Shillings 200,000.

34. However, in a matter as was before the trial Magistrate, an award of damages must legally spring out of a finding on liability. It becomes imperative, therefore, to first consider ground 5 of the appeal which touches on the Honourable Magistrate's determination on the aspect of liability. To render itself on this ground, this Court shall answer the question of whether the Learned Trial Magistrate erred in law and fact by holding that the Appellant was wholly liable for the infection that the Respondent suffered.

35. It is not in dispute that the Respondent was an employee of the Appellant, serving as a supervisor at the material time. However, the point of departure between the parties was, and is in this appeal, whether the appellant suffered a respiratory tract infection in the course of employment, attributable to the adverse workplace conditions and the Appellant's breach of duty of care.

36. The Respondent contended before the trial court that as a result of long-term inhalation of chemicals and exposure to coldness in the course of discharging his supervisorial duties, he suffered an upper respiratory infection/chemical pneumonitis. He was diagnosed with this condition on or about 7th July 2015. He produced a copy of a Medical Report dated 16th February 2016 prepared by one Dr. T. Ndeti and copies of Treatment Notes dated 8th July 2015 from Manna Medical Centre to support this.

37. This Court notes that the Respondent's illness was attributed to two causes: cold and/or chemicals. The Appellant had two main reasons for urging this Court not to be persuaded by the Respondent's assertion. First, the Respondent's role didn't entail working in the cold room at all. Therefore, he would not successfully assert that the infection was a result of exposure to coldness. Second, the allegation of inhalation of chemicals in the course of his employment was not proved, the chemicals involved were not specifically mentioned in the evidence presented by the Respondent or pleaded, and no Doctor, an expert in chemicals was called to testify in support of his case.

38. Section 109 of the *Evidence Act* provides as follows:

> " Proof of particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

39. The Appellant urged the Trial Court, and indeed this Court, to believe that the scope of the Respondent's supervisorial duty did not extend to the cold room. In the circumstances of the case, it became reasonably expected of it to tender documentary evidence to demonstrate that. This Court has not lost sight of the duty imposed on the employer under Section 74 of the *Employment Act* No. 11 of 2007, and Section 8 of the *Work Injury Benefits Act* No. 13 of 2007, to keep records relating to employment. In my view, nothing would have been easier for the Appellant herein than to produce employment records such as a duty allocation roster or any document showing the exact daily workstation of the Respondent. The Learned Magistrate did not err in taking the position that the Appellant was under a duty to tender evidence and that it failed to.

40. I am not persuaded that the Appellant did successfully demonstrate that the Respondent never worked in the cold room, as submitted by its Counsel.

41. I note that in a bid to demonstrate that the Respondent didn't suffer from the infection as a result of the stated workplace conditions, the Appellant tendered as evidence, a muster roll. The Master roll does not in my view, speak to the daily scope of the Respondent's duty. Further, the tone of the Respondent's evidence, both oral and documentary, was that the infection didn't happen in a day. It developed over time. The Appellant produced the document to convince the Court that since the Respondent was not on duty in July 2015, there is no way he could have been affected in the manner alleged. Logically speaking, the Appellant's intention was not founded, it is not convincing, and the document did not aid its case. I agree with the Learned Magistrate that the copy of the muster roll was not sufficient to rebut the Respondent's evidence.

42. In the upshot, I am persuaded that the Respondent in the course of his employment could work in the cold room. The Appellant argued that it did not give him any protective gear[s] for the cold room as he wasn't working there. In the face of the finding hereinabove, this amounts to an admission of a breach of the duty of care.

43. Employers owe their employees a common law duty to exercise reasonable care for their safety and health. They are bound to have in place systems and mechanisms necessary to safeguard employees from any reasonably foreseeable hazard. The standard of care required is that of the prudent or reasonable employer. In the House of Lords case of Paris v Stepney Borough Council [1951] AC, Lord Oaksey defined the expression 'reasonable care' as:

> 'The care which ordinarily prudent employer would take in all the circumstances.'

44. Imperative to state that *the Constitution* of Kenya 2010, Article 41, impliedly imposes an obligation upon employers to ensure the existence of safe and healthy workplaces.

45. The duty contemplated in the above-mentioned constitutional provision has a statutory underpinning in Section 6 of the *Occupational Safety and Health Act* No. 15 of 2007 which provides that: -

> " Duties of occupiers
>
> 1. Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.
>
> 2. Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—
>
> (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

(b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

(d) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;

(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;

(f) informing all persons employed of—

(i) any risks from new technologies; and

(ii) imminent danger; and

(g) ensuring that every person employed participates in the application and review of safety and health measures.

(3) Every occupier shall carry out appropriate risk assessments in relation to the safety and health of persons employed and, based on these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and processes under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in this Act.

(4) Every occupier shall send a copy of a report of risk assessment carried out under this section to the area occupational safety and health officer.

(5) Every occupier shall take immediate steps to stop any operation or activity where there is an imminent and serious danger to safety and health and to evacuate all persons employed as appropriate.

(6) It is the duty of every occupier to register his workplace unless such workplace is excepted from registration under this Act.

(7) An occupier who fails to comply with a duty imposed on him under this section commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both."

46. Under Section 2 of the same Act, an "occupier" is defined as "the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer."

47. There is therefore no doubt in this Court's mind that the Appellant owed the Respondent, a common law, statutory, and constitutional, duty of care which duty it admits to have breached.

48. On the issue of exposure to chemicals, the Appellant argues that the Respondent did not specifically plead which harmful chemicals he was exposed to. The chemicals were not specified either in, the Medical Report dated 16th February 2016 or the Treatment Notes dated 8th July 2015. The Respondent did not produce any report prepared by an expert identifying the specific chemicals that are alleged to have harmed the Respondent. I agree with the Appellant that the Respondent's pleadings, oral and documentary evidence were destitute of specificity as regards the chemicals that harmed him and that this state rendered his assertion that the chemicals caused him harm unproven.

49. I agree with the Honourable Court in Homegrown (K) Limited (Supra) that the specific chemicals should have been identified through expert evidence and a scientific basis. Be that as it may, the foregoing does not defeat the Respondent's case as the harm was stated to have been a result of exposure to the cold and chemicals. The Appellant's evidence did not rebut the Respondent's case as regards the exposure to the cold and its effect on him.

50. For the above reasons, I uphold the finding of the Trial Magistrate that the Appellant is 100% liable for the Respondent's respiratory tract infection.

Whether the Learned Trial Magistrate erred in law and fact by awarding the Respondent Kshs. 200,000/- as general damages.

51. As to when an Appellate Court can interfere with an award of general damages by a trial court, the Court of Appeal in Gicheru vs Morton and Another (2005) 2 KLR 333, eloquently explained;-

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

52. Similarly, in Denshire Muteti Wambua Vs KPLC CA 60 of 2004 citing with approval the case of Kemfro Africa Ltd T/A Meru Express Service & Gathogo Kanini Vs A.M.M. Lubia & Another (1982-988) KAR 777 at P. 730 the Court of Appeal held that:-

> " The principles to be considered 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 for Eastern Africa to be that it must be satisfied that either 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. See Lango vs Manyoka (1961) EA 705, 709, 713, Lukenya Ranching & Farming Co-operative Society Ltd Vs Kavoloto (1970) EA 414, 418, 419."

53. However, this Court has not lost sight of the principle that comparable injuries should as far as possible attract comparable awards.

54. The Appellant argues that the Trial Magistrate should have been guided by the award of Kshs. 100,000/- in George Morara Masitsa vs Texplast Industries Limited [2015] eKLR. On the other hand, the Respondent argues that the facts of that case were different from those in the present case. In his view, the Honorable Magistrate ought to have followed the decision in Paul Gakunu Mwangi (Supra), where the Plaintiff was awarded Kshs. 750,000/- for what he contends as similar injuries to what he suffered.

55. I have reviewed both authorities cited by the parties and note that the Plaintiff in the Paul Gakunu case suffered "byssinosis-chronic dyspnea" which is a chronic chest infection and chronic obstructive airway disease due to inhalation of dust and the court awarded him Kshs. 750,000 as general damages for pain and suffering. In that case, the Plaintiff developed a "progressive respiratory disability" which implies some degree of permanence. His illness was chronic, having persisted from 1984 until it was diagnosed in 1993.

56. In George Morara (Supra), the Plaintiff contracted a chest infection and sustained recurrent chest pains and coughs as a result of allergic rhinitis, headaches and nasal congestion as a consequence of working in an unsafe polluted area without any or adequate safety gear or clothing which the Respondent was under a duty to provide. He was awarded Kshs. 100,000/- as general damages.

57. Turning to the present case, the Respondent herein developed an upper respiratory tract infection which manifested through coughing, chest pains and difficulties in breathing. He was treated and had fully healed by the time the Medical Report dated 16th February 2016 was made. Considering the nature of the health harm, the age of the decisions cited by the Appellant and the inflation factor, I return that an award of Kshs. 200,000/- as general damages was not excessive but adequate.

58. Although the award of special damages was not challenged, for the completeness of the record, I am obliged to note that the Learned Magistrate was correct in making an award of special damages of Kshs. 3,000/-, as this amount was pleaded and proved through the receipt produced. It is trite law that special damages should not only be specifically pleaded but also strictly proved: See Herbert Hahn –vs- Amrik Singh (1982 –88)1 KAR 738; Corporate Insurance Co. Ltd. –Vs- Loice Wanjiru Wachira C.A. No.151 of 1995 C.A and Sande Vs Kenya Co-operative Creameries Ltd, [1992] LLR 314 (CAK) as cited in Paul Gakunu (Supra).

59. After careful consideration of the parameters set out in the case of Mbogo & Another -v- Shah [1968] EA 93, I see no sufficient reason that has been advanced that will prompt this Court to disturb the decision of the trial Court, though very brief. The Appellant has not proved that the Learned Magistrate misdirected herself, acted on matters that she should not have acted on, failed to take into consideration matters that she should have and/or arrived at the wrong conclusion.

60. In the upshot, I hereby dismiss the present Appeal with costs.

61. It is so ordered.

READ, DELIVERED AND SIGNED THIS 23rd DAY OF NOVEMBER, 2023.

.....

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Kiwinja for Appellant

Mr. Orina for Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments

and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE