



REPUBLIC OF KENYA



KENYA LAW
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**Volcan Holding Limited v Gitonga (Civil Appeal E161 of 2022)
[2025] KEHC 566 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E161 OF 2022
JM NANG'EA, J
JANUARY 29, 2025**

BETWEEN

VOLCAN HOLDING LIMITED APPELLANT

AND

ANGELA NDANU KATHUKU GITONGA RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. M. W. Kamau, Resident Magistrate, Molo delivered on 27th October, 2022 in Molo CMCC No. 018 of 2022)

JUDGMENT

1. In this appeal, the Appellant challenges the learned trial magistrate's judgment, in favour of the Respondent on special damages only. The Respondent had sued the Appellant for general damages, special damages of Kshs. 353,591, future medical costs of Kshs. 200,000/=, the costs of the suit and interest. The claim followed a road traffic accident in which the respondent was injured as a result of alleged careless or negligent driving of the Appellant's motor vehicle registration number KCB 077Z/ZE9589.
2. The special damages claim is particularized in the suit as follows;-
Medical report - Kshs. 7,000/=
Official Search - Kshs. 1,100/=
Police Abstract - Kshs. 200/=
P3 Form - Kshs. 3,000/=
Medical Expenses - Kshs. 342,291/=
3. The trial court allowed the claim for Kshs. 342,291/= on account of medical expenses which were proven by invoices said to have been settled by the Respondent's insurer. The other claims were either



allowed as uncontested or rejected for want of proof. Future medical costs were granted in the sum of Kshs. 200,000/= as prayed.

4. By Memorandum of appeal dated 24/11/2022 and filed on 30/11/2022 the Appellant contests the special damages awards on various grounds that may be summarized into two as hereunder:-
 1. That the learned trial magistrate erred in law and fact in granting special damages to the respondent without strict proof thereof;
and
 2. That the learned trial magistrate erred in law and fact in awarding special damages against legal and judicial principles.
5. In proof of her special damages claim, the Respondent tendered a receipt of Kshs. 1,100/= being charges paid to obtain records of ownership of the accident vehicle, a further receipt for Kshs. 7,000/= evidencing payment of fees to obtain a medical examination report and invoices issued by Nairobi Women's Hospital all representing a sum of Kshs. 342,291/= as medical costs. The Respondent told the court under cross-examination by the Appellant's Counsel that the invoices were settled by her insurer (CIC Insurance Company Limited).
6. As already noted, the lower court allowed the medical expenses reimbursement in the sum of Kshs. 342,291/=. It also awarded the sum of Kshs. 7,000/= and Kshs. 1,100/= in medical examination fees and vehicle ownership search respectively which were said to have been admitted. The total award of special damages was Kshs. 350,391/=

Guiding Principles

7. It is trite law that the appellate court can only interfere with the finding and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd v Oakdale Commodities Ltd* (1997) eKLR Civil Appeal No. 198 of 1995). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle v Associated Motor Boat Co.* (1968) EA 123. The Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."
8. Learned Counsel for the parties filed Written Submissions. The Appellant's advocates submit that the Appellant is especially objecting to the award under special damages and future medical costs. Counsel reinstated the now settled legal principle that special damages must not only be specifically pleaded but also strictly proven (see case law in *Francis Muthee Nthiga v David N. Waweru* [2014] eKLR referred to in Counsel Submissions).



9. The Appellant further submits that future medical costs are also in the nature of special damages, even though within general damages, and should equally be pleaded and strictly proven as held by the Court of Appeal in *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR.
10. According to the Appellant, since the medical expenses incurred by the Respondent were paid by her insurer, the same is not recoverable from it as that would amount to double compensation. Reliance is placed on Section 43 of the *National Hospital Insurance Act* as prohibiting such recovery. The court is told that making reimbursement to the Respondent in circumstances would be unjust enrichment. I have been referred to judicial determinations in *John Mwangi Munyiri & Another v Paul Wachira Njuguna* [2020] eKLR inter alia in support of this legal position.
11. The Appellant's Advocates further contend that, in any event, the invoices tendered in proof of the expenditure should have been rejected as they are not evidence of payment as observed in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR quoted by Counsel.
12. Regarding the lower court's award of Kshs. 200,000/= in future medical expenses which is also contested, the Appellant concedes that the Respondent's medical examination report opines that the amount would be expended for removal of metal implants inserted in her injured elbow. It is, however, contended that none of the medical records exhibited indicate the amount payable for removal of the metal implants.
13. The Appellant also complains that a second medical report prepared by its doctor (Dr. M. S. Malik) was not considered by the trial court. That report estimates the costs of removal of the implants in a Mission Hospital at Kshs. 50,000/=. Counsel think that this opinion is more reliable than that of the respondent's doctor for the reason that the latter is a General Practitioner while Dr. Malik is a Consultant Surgeon. Dr. Malik's report is said to have been admitted in evidence by consent of the parties. The court is therefore urged to allow only the sum of Kshs. 50,000/= under the claim for future medical costs.
14. The Respondent retorts that refund of the medical costs incurred does not amount to double compensation. She contends that she had paid premiums to her insurers and the amount claimed from the Appellant will be paid to her and not to the insurers. The respondent relies inter alia on the decision of the Supreme Court of the State of Oregon in America (*George White v Jubitz Reinan v Pacific Motor Trucking Company*).
15. Locally, the Respondent cites inter alia the judicial determination in *Leli chake Ndoro v Maree Ahmed & S. M. Lordhib* [2017] eKLR in which it was observed that the insurance doctrine of subrogation does not apply to personal injury claims such as herein. The court is told that insurance companies only seek reimbursement or indemnity for compensation made to their insured clients in material damage claims.
16. Double compensation does not therefore arise in the circumstances of this case, according to the Respondent.
17. The issues for determination in this appeal are as hereunder;
 - a. Whether proforma invoices are sufficient proof of medical expenses incurred in the circumstances of this case.
 - b. Whether reimbursing the Respondent medical expenses paid by her insurers amounts to double compensation and thus unlawful enrichment.
 - c. Whether the Respondent was lawfully awarded Kshs. 200,000/= as future medical costs.



18. The Respondent's advocates have not responded to the Appellant's submissions that the proforma invoices produced in the lower court are not proof of actual payment. The court took this position in the case of Stephen Mwigiria Akonya supra. Indeed this is the establishment legal position. In *Idris & Another v Lime & Another* [2023] eKLR, this court restated that;

“An invoice is not proof of payment and that special damages can only be proved by producing actual receipts or invoices endorsed with the word “Paid”.

The same approach was adopted in *Total (Kenya) Limited v Janevams Limited* [2015] eKLR among many other judicial determinations.

19. The trial court therefore wrongly admitted and relied upon the invoices as proof of the medical expenses allegedly incurred. This is not strict proof of special damages envisaged by the law.
20. The foregoing finding alone is sufficient to dispose of the appeal as to the special damages claim. I need not to go into the question of whether or not the Respondent is seeking double compensation.
21. Concerning the appeal on future medical costs, the claim was specifically pleaded as required by the law. Dr. Omuyoma who prepared the respondent's medical report opined that the cost of removal of metal implants inserted in his elbow is Kshs. 200,000/=. Dr. Malik who tendered a second medical examination report on behalf of the Appellant opines that Kshs. 50,000/= would be chargeable at a Mission Hospital for the operation.
22. Whereas the Appellant wants the court to believe its doctor because he is a Consultant Surgeon and the Respondent's doctor a General Physician, none of the doctors testified in person for the court to establish who between them is more qualified to guide the court. There is nothing in the evidence suggesting that the Respondent's doctor is relatively unqualified to give the opinion he offered.
23. Taking into account the substantially variant medical opinion, I would grant the Respondent Kshs. 100,000/= in future medical costs.
24. In the end, the special damages claim of Kshs. 342,291 in medical expenses was wrongly allowed while the claim for medical costs is allowed in the sum of Kshs. 100,000/=
25. Consequently, the trial court's judgement on special damages and future medical costs is set aside and substituted with judgment in the sum of Kshs. 11,100/= and Kshs. 100,000/= respectively. The amounts will be subject to the agreed contribution ratio. The parties will bear their own costs of the appeal.
26. Judgment accordingly.

J. M. NANG'EA - JUDGE

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY, 2025 IN THE PRESENCE OF:

The Appellant's Advocate, Absent

The Respondent's Advocate, Mr. Wafula

Court Assistant (Jeniffer)

J.M. NANG'EA - JUDGE.

