



**Nicolas v Wells Fargo Limited (Civil Appeal E099 of 2024)
[2025] KEHC 2333 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E099 OF 2024
DKN MAGARE, J
FEBRUARY 27, 2025**

BETWEEN

GEOFFREY NYANDEGE NICOLAS APPELLANT

AND

WELLS FARGO LIMITED RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. W.A. Kugwa Wahinya (RM) on 29.5.2024 in Kisii CMCC No. 797 of 2022.
2. The appeal is on quantum only. The Appellant lodged the Memorandum of Appeal dated 5.6.2024 raising the following grounds of appeal:
 - a. The learned magistrate erred in law and fact in awarding Kshs. 450,000/= for general damages.
 - b. The learned magistrate erred in law and fact in failing to award Ksh. 200,000/= for future medical expenses.
 - c. The learned magistrate erred in law and fact in failing to consider evidence and submissions of the Appellant.
 - d. The learned magistrate erred in law and fact in awarding underestimated damages.

Pleadings.

3. In the Complaint dated 3.10.2022, the Appellant claimed damages for an accident pleaded to have occurred on 8.8.2022 along Kisii – Oyugis road at Nyamaturo area involving the Appellant’s motorcycle Registration No. KMFR 618Y and motor vehicle Registration No. KCT 638Y owned by the Respondent and driven by the Respondent’s agent. The Appellant set forth particulars of negligence and injuries and pleaded special damages. The injuries were pleaded as follows:



- i. Left tibia fracture
 - ii. Left fibula fracture
 - iii. Right 1st, 2nd, 3rd and 4th metatarsal bone fracture
 - iv. Bruises on upper limbs
 - v. Bruises on the face
 - vi. Bruises on lower limbs
4. The special damages were also pleaded as follows:
- i. Treatment expenses Ksh. 417,000/=
 - ii. Medical report Ksh. 5,000/=
 - iii. Demand Ksh. 140/=
 - iv. Doctor's attendance Ksh. 6,000/=
 - v. 2nd Medial examination Ksh. 3,000/=
 - vi. Future medical expenses Ksh. 200,000/=
5. The Respondents filed their joint defence dated 27.10.2022. They denied the particulars of negligence as pleaded by the Appellant and blamed the Appellant for the accident.
6. The lower court considered the matter and awarded reliefs as follows:
- Liability agreed at 75:25
- Special damages Ksh 450,000/=
- General damages Ksh. 322,510/=
- Future medical expenses Ksh. 80,000/=

Evidence

7. PW1 was the Plaintiff. He relied on his witness statement and bundle of documents dated 3.10.2022 produced in evidence.
8. PW3 was Dr. Morebu Peter. He relied on his medical report and testified that he examined the appellant and found injuries as pleaded. On cross examination, he testified that he examined the Appellant on 18.8.2022. He relied on the X-ray pictures and treatment notes. He had fractured his left leg. The future medical expenses were an approximation and could be more or less.
9. By consent, the parties agreed on liability at 75:25 in favour of the Appellant. The 2nd medical report was also produced in support of the Respondent's case and parties then would file submissions on the issue of quantum of damages.

Submissions

10. The Appellant submitted that Ksh. 1,000,000/= was adequate as regards the injuries herein while the Respondent submitted for Kshs. 350,000/= as adequate. The Appellant relied on John Mwangi Kiiru v Salome Mwangi [2019] eKLR while the Respondent relied inter alia on Simon Kimote v Agro Solutions Limited [2012] eKLR.



Analysis

11. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. 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 v 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.”

12. The duty of the first appellate court was set out in the case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the judges 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.”

13. The Court is to remember that it has 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 that of the lower court, as parties cannot read into those documents matters extrinsic to them. In the case of *Peters v 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...”

14. The onus was on the Appellant to prove the case on a balance of probabilities. It is not lost on this court that a party who alleges must prove. The Court of Appeal discussed legal burden of proof in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, as follows:

“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 cast 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.”

15. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“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.”

16. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the judges of appeal held that:

“Denning J. in *Miller v 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 lose, because the requisite standard will not have been attained.”

17. The appeal herein is on quantum. There is the medical report by Dr. Morebu dated 18.8.2022 and the medical report by Dr. M.S. Malik dated 18.11.2022. The contrast between the two medical reports is that the Appellant’s medical doctor found among others tibia and fibula fracture while the Respondent’s medical doctor found only left tibia fracture with no fracture of the left fibula. There was also no metal implant in the right thigh.

18. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in *Shah and Another v Shah and Others* [2003] 1 EA 290:

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”

19. Further, the Court of Appeal, on its part in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001* [2007] 1 EA 139 held that:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

20. Furthermore, in *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-



"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

21. This court will independently reevaluate the expert reports herein. The Appellant had metal fixation in the left tibia, and that was the common position of the medical doctors. Therefore, I believe it does not matter that there was no metal fixation in the left tibia. Dr. Malik confirmed that there was reduction and fixation. The Appellant was immobilized for three weeks on crutches, as per Dr. Malik. He indicated that the patient suffered total incapacity of a temporary nature. He was to be examined after one year to determine permanent incapacity. This report was done three months after the accident.
22. The medical records, already admitted, in particular the invoices, show treatment on the tibia/fibula, 1st, 2nd and 3rd metatarsal. Treatment received on admission shows the injuries, that is, the tibia and fibula fracture, the 1st, 2nd, 3rd and 4th metatarsal bone fractures, and to be seen at the orthopedic clinic. The P3 had the same injuries.
23. Dr. Malik continued that there were long scars on the legs, one measuring 3 cm and another 25 cm. The foot was swollen slightly 3 months later. The tibia and fibula were fixed with intramedullary interlocking metal nails and screws.
24. The doctor cheekily found that the Appellant sustained soft tissue injuries to his face and left joint, a fracture of the left tibia, and fractures of the metatarsal bones of the right foot as a 'result of a motorcycle accident.' How the doctor knew it was a motorcycle accident is beyond peradventure.
25. Looking at the totality of the evidence and the original treatment notes, I find that Dr. Malik's report does not reflect the injuries suffered and the circumstances of the accident. Further, the report should not have been admitted in evidence as it is written without prejudice. Such a report is of no use to the matter at hand. The court below ought to have disregarded the same. It serves no useful purpose to carry out a second medical report and label it "without prejudice" (not to be used in court).
26. The other more poignant position was that the P3 and Dr. Morebu's reports were available at the time Dr. Malik was examining the Appellant. He chose not to comment on them or point out errors either of principle or metrics. He also chose not to defend his report. When faced with conflicting reports, the witness who successfully defended his report triumphs. In the case of *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*, Justice G.V. Odunga as then he was stated as doth:

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:

"Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB [2003] 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."



27. It is more likely than not that Dr. Malik could not have defended his report, or his evidence would have been adverse to the Respondent. I reject his report as falling far below the professional standards when commenting on prior medical evidence, including treatment records.
28. The report, having a proper perspective with other medical documents, including the invoices, is by Dr. Morebu. He found the Appellant with 20% permanent disability. He also found that a sum of Ksh 200,000/= will be used to remove the metal implant. Dr. Morebu defended his report in court and did not cross-examine the figure for future medical reports. Indeed, the original surgery from the report spent Ksh 200,000/=, being Ksh 80,000/- for the hospital and 120,000/= surgeon's fees.
29. The Respondent's doctor did not dispute that the metal fixation in the Appellant's left tibia would need to be removed, nor did he dispute the projected amount of Ksh. 200,000/= required to remove metal implants. Therefore, the lower court was in error when it awarded the Appellant Ksh. 80,000/= for future medical expenses. The court plucked the figure 80,000/= from the air. I set aside the figure as fictitious and award a sum of Ksh 200,000/= for future medical expenses.
30. Further, in my conclusion, I have already indicated that the medical report by the Appellant's doctor who examined the Appellant only a week after the injuries is more credible. I find no basis of ruling out the fracture to the left fibula. This is more so when he was treated for the same.
31. On the question of quantum of damages, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:
- “Assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
32. The court of appeal further postulated in the case of *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457* as follows:
- “The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect... A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own... The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”
33. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Servcie v A.M Lubia & Another 1957 KLR 27* as follows: -



The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

34. 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 vs 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...”

35. It is thus settled that 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. It has been held time and again by the Court of Appeal that the court of first instance assesses damages even if it finds that liability has not been established as correctly stated in *Ngonze v Ng'ang'a* (Civil Suit 82 of 2017) [2024] KEHC 11261 (KLR) (26 September 2024) (Judgment), where this court stated as doth:

“46. Assessment of damages is exercise in discretion. In the case of *Butler –V- Butler* (1984) KLR 225 the court held: -“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision.

47. Nevertheless, the court is duty bound to assess damages even when the suit is dismissed. In *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, the court noted as follows: -“It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”

36. With the above guide, if the award proposed by the lower court is inordinately low, then I will have to set it aside. If, however, it is just low but not inordinately low, I will not do so. The injuries pleaded and proved were as follows:

- i. Left tibia fracture
- ii. Left fibula fracture



- iii. Right 1st, 2nd, 3rd and 4th metatarsal bone fracture
 - iv. Bruises on upper limbs
 - v. Bruises on the face
 - vi. Bruises on lower limbs
37. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in *Butler v Butler* [1984] KLR 225, as follows:-
- a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
 - b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
 - c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
 - d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
 - e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and
 - f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.
38. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards."
39. I understand no single case is typically identical to the other. In *Penina Waithira Kaburu v LP* [2019] eKLR, the Court stated thus on the issue of award of general damages –
- "While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."
40. In my reevaluation, the lower court did not cite any authority that guided its founding on the award of general damaged. I dismiss the authorities relied on by the Appellant as they projected more severe



injuries. The authorities by the Respondent on the other hand presented lesser injuries to the one in this case. I now analyze similar fact cases on quantum.

41. The Civicon Limited case (supra) had distinguishable injuries. Therein, the 2nd Plaintiff, one Gladys Nyakerario Omwancha suffered a fracture of the tibia and fibula and dislocation of the hip joint and was awarded Kshs. 1,000,000/= that was reduced to Kshs. 450,000/= on appeal.
42. In Sammy Mugo Kinyanjui & Another v Kairo Thuo [2017] eKLR, Kshs. 600,000/= was awarded for the Plaintiff who had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula.
43. In addition to the soft tissue injuries and the fractures of the left tibia and fibula, the Appellant also suffered fracture of the metatarsal bones. Therefore, more severe than the above cases. In my view, the award of Ksh. 450,000/- by the lower court was inordinately low and did not present an accurate estimate of damages. I set it aside. 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.
44. Equally, 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.....”
45. Therefore, in the circumstances, the award of Kshs. 800,000/- for general damages would in my view be adequate compensation to the Appellant.
46. 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 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.”

47. 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 v 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.”

48. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances; that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort v Phoenix of East Africa*



Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

49. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi [1982-88] IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

50. On special damages the Appellant pleaded as follows:

- i. Treatment expenses 417, 510/=
- ii. Medical report 5,000/=
- iii. Registration of demand Ksh 140/=
- iv. Attendance charges - Ksh 6,000/=
- v. Anticipated second medical report – Ksh 3,000/=.
- vi. Future medical expenses.

51. Future medical expenses have been dealt with separately. Registration of demand and attendance charges belong to costs and are not awardable as special damages. Special damages must relate to the cause of action, not the court case, except identification documents like searches. The bill paid was KSh 417,510/-. A deposit of KSh 100,000/= was paid initially leaving a sum of KSh 317,000/=. A sum of Ksh 137,510/= was paid on 5/10/2022. A sum of Ksh 180,000/= was paid on 15/9/2022. A sum of Ksh. 5,000/= was paid for the medical report. This totals to Ksh 422,510/=. It is fallacious to require a separate receipt when the invoice indicates that a sum of Ksh 100,000/= was paid and receipt number HE- REC-7221 issued. I am satisfied that the sum of Ksh Ksh 422,510/= as special damages were proved. The court left out a sum of Ksh 100,000/=, which is clearly shown as paid by the Appellant. I set aside the award of special damages and award the sum of Ksh 422,510/=. which was pleaded and proved.

52. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
53. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

54. Costs follow the event. In this case, the Appellant was successful. They shall have costs of Kshs. 125,000/=.

Determination.

55. In the upshot, I make the following orders:
- a. I set aside the award of special damages and award the sum of Ksh 422,510/=, which was pleaded and proved.
 - b. Special damages shall attract interest at court rates from the date of filing in the lower court, on 17.10.2022.
 - c. I set aside the award of general damages and award the sum of Kshs. 800,000/=. This shall have interest from 29.05.2024, the date of judgment in the lower court.
 - d. I set aside the award of the costs of future medical expenses and in lieu thereof, award a sum of Ksh 200,000/=. This shall have interest from 29.05.2024, the date of judgment in the lower court.
 - e. The Appellant shall have costs of this appeal of Kshs. 125,000/-.
 - f. 30 days stay of execution.
 - g. Right of appeal 14 days.
 - h. File closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.



KIZITO MAGARE

JUDGE

In the presence of:

Mr. Ogweno for Orayo for the Appellant

Mr. Orudo for the Respondent

Court Assistant – Michael

