



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ikinya v Gatere (Civil Appeal E258 of 2022) [2025] KEHC 6164 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 6164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E258 OF 2022  
DO CHEPKWONY, J  
MARCH 28, 2025**

**BETWEEN**

**DAVID MURAGE IKINYA ..... APPELLANT**

**AND**

**WILSON MWANGI GATERE ..... RESPONDENT**

*(Being an Appeal from Judgment from the Hon. G. Omodho (PM) delivered on 28th day of September 2022 at Chief Magistrate court in Kiambu CMCC No. E11 OF 2021)*

**RULING**

1. This ruling determines the Appellant's/Applicant's Notice of Motion application dated 29<sup>th</sup> May, 2024 filed under Certificate of Urgency and therein, he is seeking the following orders:
  - a. Spent.
  - b. That this Honourable Court reviews its judgement in respect to special damages delivered herein on 12<sup>th</sup> April, 2024 and substitutes the same with the award of the Learned Trial Magistrate.
  - c. Costs be in the cause.
2. The Application is based on the grounds set out on its face and reiterated in the Supporting Affidavit of Erick Ochieng sworn on 20<sup>th</sup> May, 2024 as follows:-
  - a. That there is an error in the face of the record which warrants a review of the Judgement.
  - b. That it is just and fair that the judgement delivered herein on 12<sup>th</sup> April, 2024 be reviewed as relates to special damages.
  - c. That the Respondent did not file a cross-appeal and it is only just and fair that the amount awarded for special damages takes into consideration this fact.



3. According to the Appellant, the Judgment in question interfered with general damages awarded by the trial Court for being inordinately high but increased the special damages from Kshs.342,050/= to Kshs.417,095/=. The Appellant avers that special damages could only be increased only if the Respondent has filed a cross-appeal hence this is an error on the face of the Judgment which warrants to be revised.
4. The Application is opposed through a Replying Affidavit sworn by the Respondent, Wilson Mwangi Gatere sworn on 11<sup>th</sup> July, 2024. He avers that the application is misconceived, frivolous and an abuse of court process. According to him, the Appellate court has powers to disturb an award of damages if it is inordinately high or low without necessarily requiring that there be a cross-appeal. He holds that the claim for future medical expenses is a special claim which, if specifically proven should be awarded. Thus, this court found that the sum of Kshs. 350,000/= had been specifically been pleaded and proven and consequently proceeded to award the same.
5. The Respondent further avers that the Applicant does not have any grounds for filing the current application and since there should be an end to litigation it would be in the interest of justice that the application is struck out with costs to the Respondent.
6. The court directed that the application be canvassed by way of written submissions and the Applicant filed submissions dated 29<sup>th</sup> November, 2024 whereby he submits that the appeal emanated from the judgment of the trial court which had awarded Kshs. 2,000,000/= as general damages and Kshs. 342,050 as special damages. According to the Appellant, he filed an appeal on both liability and quantum whereas the Respondent did not file any cross appeal. However, besides setting aside part of the award in general damages, this Court enhanced the award in special damages from Kshs. 342,050/= to Kshs. 767,295/=: which according to him was made erroneously since it was not an issue on appeal. He has relied on the case of Galaxy Paints Company Ltd –vs- Falcon Guards Ltd [2006]eKLR, where the Court stated inter-alia that:-

“In Gandy –VS- Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error in the face of the record.”

7. The Appellant holds that this court did not need to interfere with the award since there was no cross appeal and has relied on the case of HELLEN MUENI MWANTHI –VS- JULIUS KIILU SILA & ANOR CIVIL APPEAL NO. 352 OF 2005 and submits that Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules grants the court power to review its judgment only if the three ingredients set therein have been met. As such, the Applicant submits that he has raised a sufficient reason to warrant a review of the judgment of the court in terms of Order 45 of the Civil Procedure Rules.

### **Analysis and Determination**

8. The court has considered the Notice of Motion application, the affidavits sworn in support and in rebuttal of the application, alongside the Applicant’s submissions. The court finds that the main issue for determination is whether the Applicant has made a case to warrant the review of this Court’s Judgment as sought.



9. This court's jurisdiction to review a decree or order of its Judgment is enshrined under Section 80 of the [Civil Procedure Act](#) which provides that:-
- “ Any person who considers himself aggrieved-
- a. By a decree or order in which an appeal allowed by this Act, but from which no appeal has;
  - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
10. For an application for review to succeed Order 45 of the Civil Procedure Rules, 2010 provides that any of the following grounds should be demonstrated:-
- a. There must be discovery of a new and important matter which
  - b. after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - c. There was a mistake or error apparent on the face of the record; or
  - d. There were other sufficient reasons; and
  - e. The application must have been made without undue delay.
11. In essence, a party who discovers new evidence or an error on the face of the ruling or judgment on record after the same has been delivered may apply for a review thereof based on Section 80 of the [Civil Procedure Act](#) which grants the court the discretionary power to review a matter and make any orders it considers appropriate including setting aside or amending the original order or decree.
12. In this case the Applicant argues that there is an error on the face of the Judgment as well as the existence of other sufficient reasons to warrant a review of the order or Judgment in that apart from interfering with general damages that were awarded by the trial court for being inordinately high but enhanced the award on special damages from Kshs.342.000/= to Kshs.419.095/=. According to the Appellant special damages could only be increased if the Respondent had raised a cross-appeal, which is an error on the fact of the judgment on record. On the other hand, this Court as an appellate court has power to disturb an award as it did if it finds it ordinarily high or low regardless of a cross-appeal.
13. From the onset, none of the parties have challenged that the application was not filed without undue delay, hence this Court will not to belabour on this issue. I have read through the trial court's Judgment and find that the court therein found that the issue on future medical expenses was not properly proven as per the required standard of proof. Indeed, this issue on future medical expenses being dismissed by the trial court was not raised by the Respondent through a cross-appeal, this Court proceeds to find and award on the same and enhanced the award on special damages. In other words, the award on future medical expenses is not an issue that was pleaded and or made subject to this appeal.
14. From the foregoing findings, this Court finds that before adjudicating on an issue which had not been raised before it, amounts to a sufficient ground that warrants the review of its Judgment in line with Order 45 of the Civil Procedure Code.
15. Consequently, the Notice of Motion application dated 29<sup>th</sup> May, 2024 I is therefore merited and allowed in the following terms:-



- a. That the Judgment delivered on 12<sup>th</sup> April, 2024 is hereby reviewed in respect of the special damages awarded. The special damages award of Kshs.417,095/= is reverted back/substituted with the award of Kshs.342,050 awarded by the learned trial Magistrate.
- b. Each party shall bear its own costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF MARCH , 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Ochieng counsel for Appellant

M/S Wambui holding brief for Mr. Njuguna for Respondent

Court Assistant - Martin

