



**Nyamweya & another v Mutembei (Civil Appeal E002 of 2023)
[2024] KEHC 361 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E002 OF 2023
LW GITARI, J
JANUARY 25, 2024**

BETWEEN

ONDIEKI DAVID NYAMWEYA 1ST APPELLANT

PATRICK OJIAMBO OUMA 2ND APPELLANT

AND

TIMOTHY MURITHI MUTEMBEI RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court in Chuka CMCC No. E114 of 2022 that was delivered on 22nd December, 2022. Before the lower court, the Respondent herein had sought for general and special damages, and costs of the suit together with interest at court rates. His claim arose from a road traffic accident that occurred on or around 30th January, 2022 along Chuka-Meru road at Wiru area near Chogoria. As per the Respondent’s plaint dated 14th May, 2022, the 1st Appellant herein was the driver of motor vehicle registration number KBQ 728Y which he was driving toward Meru direction. He averred that the said motor vehicle was owned by the 2nd Appellant.
2. The Respondent further averred that the 1st Appellant drove the said motor vehicle so carelessly and negligently that while overtaking on a sharp corner, he veered off his lane and hit motor cycle registration number KMFE 994B which motor cycle was travelling from the Meru direction and was being ridden by the Respondent. That as a result, the said motor vehicle ran over the Respondent causing him to suffer extensive bodily injuries leading to permanent incapacitation.
3. The Appellants filed a joint statement of defence dated 22nd June, 2022 denying the Respondent’s claim and putting to the Respondent to strict proof thereof. They averred that if there was any accident that occurred on the material day, then the same was wholly caused or substantially contributed to by the negligence of the Respondent. Further, that the Respondent encroached the lane of the motor vehicle while driving at a high speed.



4. On 22nd December, 2022, the learned trial magistrate entered the impugned judgment in favour of the Respondent in the following terms:
 - i. Liability – 100%;
 - ii. General damages – Kshs. 3,000,000/=;
 - iii. Future Medical Expenses – Kshs. 500,000/=;
 - iv. Special damages – Kshs. 1,133,440/=;
 - v. Costs and interest at court rates.
5. The Appellants herein, being dissatisfied with the judgment of the learned trial magistrate, filed the present appeal vide the Memorandum of Appeal dated 18th January, 2023. The Appellants based their appeal on the following grounds:
 - i. That the Learned Magistrate erred in law and fact in holding the Appellant 100% liable for the accident which was against the weight of evidence.
 - ii. That the Learned Magistrate totally ignored the contribution of the Respondent in the occurrence of the accident herein considering he was intoxicated at the time of the accident as per the medical records.
 - iii. That the Learned Magistrate misapprehended the facts and the law in the manner she assessed general damages for pain and suffering and arrived at a figure of Kshs. 3,000,000/= which is exorbitant in the circumstances.
 - iv. That the Learned Magistrate ignored the requirement that special damages must be specifically pleaded and proved and awarded special damages amounting to Kshs. 1,333,440/= without the same being fully proved as required by law.
6. Based on the above grounds, the Appellant thus prayed for the following orders:
 - i. That this Appeal be allowed and the decision and judgment of the trial court in Chuka CMCC No. E114 of 2020 both on liability and quantum be set aside save for damages for future medical expenses.
 - ii. That this Honourable Court be pleased to re-evaluate the evidence and make its own finding and judgment with regard to liability.
 - iii. That this Honourable Court be pleased to make its own assessment of damages for pain and suffering and special damages as has been sufficiently proved.
 - iv. That the Appellants be awarded the costs of the Appeal herein.
7. The Appeal is contested by the Respondent and the same was canvassed by way of written submissions. Hereunder is a summary of the respective submissions by the parties.

The Appellants' Submissions

8. On the issue of liability, it is the Appellants' submission that the Respondent's medical report from Chogoria Hospital by Dr. Elijah Mwaura indicated that the Respondent was intoxicated at the time of the accident. That since he was not sober at the time of the accident, his judgment was impaired resulting in the subject accident. Secondly, that the failure by the Respondent to wear a reflector jacket aggravated the chances of the accident happening since the accident occurred at about 8.30 p.m. and



- as such, the Respondent could not be seen from a far. Further, that the Respondent's contributory negligence can be demonstrated by the Respondent's failure to put on safety apparel like a helmet. In addition, the Appellants pointed out that during trial, the Respondent never produced any driving license to show that he had obtained the necessary training to operate motorcycle on a highway, and that in the absence of such, it can be presumed that the Respondent did not have the necessary training to ride motorcycles.
9. In addition, the Appellants stated that PW1, the police officer who testified in this case, was not the investigating officer and did not have with him the investigation diary, police file, or any sketch maps of the scene. That at best, PW1's evidence was hearsay and that in the absence of evidence to corroborate what he was alleging, his evidence was of zero probative value. According to the Appellants, the fact that the 1st Appellant has never been charged with a traffic offence to date is telling. That is no wonder that the investigation diary was never produced in evidence as the same could have revealed the Respondent's culpability.
 10. The Appellants' further submitted that the testimonies of PW1 and the Respondent (PW2) contradicted with respect to where the collision happened. That according to the Respondent, the collision was not head on as he tried to swerve off the road and the point of impact was off the road. That this was contrary to PW1's narrative that the collision happened on the road on the rider's lane. The Appellants thus maintained that it was the Respondent who encroached on the 1st Appellant's lane causing the accident.
 11. Relying on the cases of Platinum Car Hire and Tours Limited v. Samuel Arasa Nyamesa & Another [2019] eKLR, and Bwire v. Wayo & Saikoko (Civil Aooeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022)(Judgment), it was the Appellants' submission that the Respondent failed to discharge his burden of proving that the Appellants herein were liable for the accident. On the strength of the cited authorities, the Appellants thus prayed for the apportionment of liability to the Respondent at 50% for his alleged contribution to the subject herein.
 12. On quantum, the Appellants submitted that the award made by the trial magistrate as general damages for pain, suffering, and loss of amenities was excessive in the circumstances as the Respondent was not permanently incapacitated from earning all living as a teacher. The Appellants' proposed an award of Kshs. 1,200,000/= under this head stating that this would be sufficient compensation to the Respondent. To buttress their proposal, they cited the following cases:
 - i. Charles Owino Odeyo v. Appollo Justus Andabwa & Another [2017] eKLR;
 - ii. George Raini Atungu v. Moffat Onsare Aunga [2021] eKLR; and
 - iii. Joseph Mwangi Thuita v. Joyce Mwole [2018] eKLR.
 13. On special damages, it was the Appellant's submission that the law requires that special damages should be specifically pleaded and proved. That the Respondent pleaded special damages of Kshs. 2,169,037/= out of which he was only able to produce receipts whose figures aggregated to Kshs. 463,723.80/= which according to the Appellants, is the sum that the Respondent is entitled to as special damages. The Appellants pointed out that the invoices of Kshs. 228,717.50/= and Kshs. 844,173.80/= from PCEA Chogoria Hospital and St. Theresa Mission Hospital Kiirua respectively did not have corresponding payment receipts that could evidence out of pocket expenses.
 14. In addition, the Appellants stated that some of the other documents were very faint and therefore illegible. Further, that some of the receipts on record are in regard to the invoices on record and therefore, awarding money under both the receipts and the invoices would lead to duplicity of awards.



According to the Appellants, the figures in the invoices should therefore be disregarded as the invoices require to be proved by way of receipts to constitute special damages.

15. In conclusion, the Appellants urged this Court to set aside the trial court's judgment and enter a judgment in the following terms:
 - i. Liability 50%:50%
 - ii. General damages (Pain & Suffering) Kshs. 1,200,000/=
 - iii. Special damages Kshs. 463,723.80/=

The Respondents' Submissions

16. On their part, the Respondent submitted that the 1st Appellant was 100% liable for causing the accident since he was overtaking at a corner on the opposite lane and at a very high speed. In this regard, the Respondent pointed out that PW1 produced a police abstract which indicate that motor vehicle registration number KBQ 728Y was to blame for causing the accident. That as per the testimony of PW2, the Respondent herein, he tried to avoid the accident by veering off the road but could not fully escape as there were guardrails on the roadside and the motor vehicle was being driven at a very high speed.
17. Further, the Respondent submitted that the allegation by the Appellants that the Respondent was culpable for the accident as he was drunk at the time of the accident was an afterthought. That this was a new issue which was never raised or canvassed at the trial court and further, that the medical report referred to by the Appellants was not produced in court and does not indicate whether the Respondent was tested for alcohol content in his blood or how the doctor concluded that he was drunk by just looking at him at a time he was in and out of consciousness. That further, the said report states that the Respondent was hit by a motor vehicle from behind which all parties agree was not the case.
18. On quantum, the Respondent relied on the following cases:
 - i. Stanley Maore v. Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]neKLR;
 - ii. Abdi Werdi Abdulahi v. James Royo Mungatia & another [2019] eKLR;
 - iii. James Joseph Rughendo v. Kenya Power and Lighting Co. Ltd. [2011] eKLR;
 - iv. Macharis Francis Mundui & another v. Joel Wanje [2017] eKLR; and
 - v. Kemfro Africa Ltd., Gathogo Kanini v. A.M.M. Lubia & Another.
19. It was submitted at paragraph 32 of the Respondent's written submissions that "...the trial court properly took into consideration the age, good health, and physical wellness of the deceased in adopting the multiplier, multiplicand and dependency ration before computing and awarding the sum of Kshs. 3,343,000 for loss of dependency." The Respondent thus urges this Court to dismiss the appeal with costs claiming that "...the appellants have failed to prove how the deceased had contributed to the occurrence of the accident or how the award made was excessive or unreasonable."
20. It is only fair to note at this point that the final submission by the Respondent on quantum does not relate to this case as the victim herein is not deceased.



Issues for Determination

21. I have examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. In my view, the main issues that arise for determination by this Court are:
- i. Whether the trial court erred in apportioning liability at 100% against the Appellants;
 - ii. Whether the assessment of general damages for pain, suffering and loss of amenities at Kshs. 3,000,000/= was excessive in the circumstances;
 - iii. Whether the award of Kshs. 1,133,440/= as special damages was erroneous; and
 - iv. Who should bear the costs of this Appeal?

Analysis

22. This is a first appeal. It is therefore this Court's duty to evaluate the entire evidence on record bearing in mind that it had no advantage of seeing the witnesses testify and watch their demeanor. This was the holding in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
23. PW1 was Senior Sergeant James Munyi Joel from Chogoria Police Station. He confirmed that an accident occurred on 30th January, 2022 at Weru area along Chuka-Chogoria road. That the said accident involved motor vehicle registration number 'KBQ 728T' and motor cycle registration number 'KMFR 994B'. According to him, the motorcycle was being driven from Chuka direction and was heading to Meru and that on reaching Weru, the driver of the motor vehicle, while using the wrong lane, knocked an oncoming motor cycle than was being ridden by the Respondent. PW1 produced a police abstract and an O.B. extract as P. Exhibits 1(a) and 1(b) respectively. On cross-examination, PW1 stated that he was not the investigating officer but sent officer to the scene. That he did not have the investigation diary but that the O.B. extract produced in evidence represented information from the officers who visited the scene.
24. PW2 was Timothy Murithi Mutembei, the Respondent herein. He adopted his witness statement dated 29th September, 2022 and testified that on the material day, he was riding motor cycle registration no. KMFR 994B from Chogoria heading to Kiraini when he got into an accident with a motor vehicle at Weru area. According to him, the motor vehicle encroached into his lane and knocked him down. He stated that he could not escape the accident by veering off to the extreme left as there were road guardrails.
25. It PW2's testimony that he got injured on his right hand and right leg as a result of the accident and was rushed to Chogoria Mission Hospital where he was admitted for 7 days before he was transferred to Kirua Mission hospital and admitted for 3 months. That because of the injuries he sustained, his right leg got amputated on the toes and foot resulting in his leg shortening by 5 cm. He further stated that his right hand has metal plates inside and cannot bend at an angle of 90° as a result. That his right small finger cannot move while the other fingers move with difficulty. He produced in evidence the documents listed in his supplementary list of documents.
26. PW3 was Dr. Nicholas Nkonge, a medical doctor working at Chuka Hospital. He produced the Respondent's medical report dated 5th May, 2022 as P.Exhibit 4. It was his testimony that when he examined the Respondent, the Respondent was in a wheelchair. He stated that the Respondent would



require removal of the metal implants from his right hand and right leg after two (2) years. Further, that the Respondent's right hand would require physiotherapy and that he had a permanent disability after amputation of his foot and the fracture of his right hand. On cross examination, he confirmed that he had not given the estimated degree of disability in his report and that the estimated cost for the surgeries that the Respondent underwent was Kshs. 1,600,000/=.

27. For the defence case, DW1 was David Ondieki Nyamweya, the 1st Appellant herein. He adopted as his evidence his statement dated 2nd August, 2022. He also produced in evidence a copy of his driving licence as D. Exhibit 1. It was his testimony that on the material day, he was driving from Nairobi heading to Meru town. He stated that he was not overtaking but negotiating a corner when he met the subject motor cycle. According to him, the motor cycle was in his lane and was at a high speed. That the motor cycle hit him on the right hand side and the rider did not have a reflector jacket.
28. DW2 was Dr. Kimathi Kioga, a medical officer working at Meru Teaching and Referral Hospital. He produced as his evidence D. Exhibit 2 which is the Respondent's medical report which he filled. On cross-examination, it was DW2's testimony that the open wound in the Respondent's right foot meant that an amputation and a skin graft were done on the foot. He stated the metal plates were inserted in the fractures on the right hand humerous arm, on the right leg femur thigh region and tibia below the knee joint and the ankle joint. According to him, the three (3) metal plates will need to be removed in future if they cause further complications. It was further his testimony that the Respondent had complications on the elbow joint causing immobility and stiffness. That Respondent's right hand ulna nerve was also affected causing the hand to be curved usually called a claw hand. Further that the Respondent would require physiotherapy and outpatient therapy and pain medications. He assessed the Respondent's degree of incapacitation at 40% and estimated his future medical treatment costs to be Kshs. 500,000/=.
29. The Appellant herein is challenging the decision of the trial court on both liability and quantum.

On Liability

30. On apportionment of liability, the two elements that need to be considered when assessing the issue of negligence are causation of accident and the blameworthiness of the parties. In the case of *Karanja -vs- Malele* (1983) eKLR 147 considered these two elements by rendering itself as follows:

“--there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence is not seeing it before hand, and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion.”
31. According to PW1, the subject motor vehicle that was being driven by the 1st Respondent was on the wrong lane and as such was to blame for causing the accident. On cross examination, PW1 stated that he was not the investigating officer and did not have the investigation diary. That he sent officers to the scene and only had the O.B. extract and police abstract to produce as evidence. further that the driver of the subject motor vehicle was not charged. As rightly submitted by the Appellants, PW1's evidence was essentially hearsay evidence. Since he was not at the scene of the accident at the time of the accident, his evidence alone cannot be used to prove how an accident happened or to determine who was to blame for the accident.
32. The only eye witnesses who testified in this case were the Respondent (PW2) and the 1st Appellant (DW1). According to the Respondent, the 1st Appellant's motor vehicle came to his lane and knocked him down. He stated that he tried to escape to the extreme left but could not because there were



guardrails. On the other hand, it was the testimony of the 1st Appellant that he was negotiating a corner and found a motor cycle on his lane which was at a high speed. He stated that the motor cycle hit him on the right side. On cross examination, it was the 1st Appellant's testimony that the police abstract produced by PW1 was incorrect for blaming him for the accident.

33. The said police abstract indicates that investigations into the subject incident were done by one CPL Boru and one CPL Jackline and that the outcome of the said investigations were that motor vehicle registration number KBQ 728Y was to blame for the accident. The 1st Appellant did not raise any objections to the production of the said police abstract. In my view, the Police Abstract Report which was produced before the trial court was a sufficient basis of finding liability on the part of the 1st Appellant as it contained information on the date of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim of the accident and the names of the investigating officers.
34. In apportioning liability, the trial court analysed the evidence before it and found that the evidence tendered by the Respondent was more probable than that of the 1st Appellant. The court further placed reliance on outcome of the investigations as indicated in the police abstract produced in evidence which blamed the 1st Appellant for causing the accident. The trial court opined that the fact that the driver of the motor vehicle was not charged with any traffic offence despite being found culpable for causing the accident did not mean that he did not cause the said accident. Having considered the circumstances of this case in totality and having regard to the evidence presented before the trial court, it is my view that the learned magistrate was right to find that the 1st Appellant was 100% liable for the accident and that the 2nd Appellant was vicariously liable for the actions of the 1st Appellant. As rightly submitted by the Respondent, the allegations that the Respondent was intoxicated at the time of the accident and that he was not licensed to ride a motor on a highway were not raised as issues before the trial court and are therefore an afterthought. As such, the appeal on liability fails.

On Quantum

35. On the assessment of quantum of damages, the court in the case of Mbogo & Another vs Shah [1968] EA 93, held that an award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Court.
36. In the case of Kigaragar v Agripiana Mary Aya [1982-1988] KAR 768, the Court of Appeal held that an appellate court would interfere with the decision of the trial court if it was shown that the sum awarded was demonstrably wrong or that the award was based on wrong principle or it was so manifestly excessive or inadequate, that a wrong principle may be inferred.
37. The Appellants in this case claim that the trial court's award of Kshs. 3,000,000/= as general damages for pain and suffering was excessive. In awarding damages for personal injury, courts should consider comparable awards for comparable injuries [See: Kigaragari v. Aya (1985) KLR 273]
38. In this case, the Respondent suffered the following injuries as per initial treatment notes by Dr. Elijah Mwaura of P.C.E.A Chogoria Hospital:
 - i. Distal humerus fracture;
 - ii. Distal radius fracture;
 - iii. Mid-femur fracture;



- iv. Distal tibia-fibular fracture;
 - v. Posterior calcaneal fracture that was reduced and immobilized.
39. As per the respondent's P3 form dated 23rd April, 2022, the Respondent further sustained a right crush foot injury which necessitated a trans-metatarsal amputation of his right foot. The medical report by Dr. Nicholas Nkonge indicated that the Respondent suffered permanent disability as result of the injuries but the degree of the incapacitation was not indicated. However, DW2, assessed the Respondent's degree of incapacitation at 40%.
40. In their submissions, the Appellants relied on the case of *George Raini Atungu v. Moffat Onsare Aunga* [2021] eKLR where the Court awarded Kshs. 650,000/= the Plaintiff sustained chest contusion, fracture of the left radius and ulns, pelvic contusion to the right leg, and fracture of the right tibia/fibula bones. He also relied on the case of *Joseph Mwangi Thuita v. Joyce Mwole* [2018] eKLR where the court awarded Kshs. 700,000/= as general damages where the Plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support. Before the trial court, the Appellants proposed an award of Kshs. 900,000/= under the head of pain and suffering which they have revised upwards to Kshs.1,200,000/= in this appeal while citing the same authorities.
41. On the other hand, the Respondent relied on the case of *Abdi Werdi Abdulahi v. James Royo Mungatia & Another* [2019] eKLR where the court awarded Kshs. 3,500,000/= as general damages for the following injuries:
- i. Multiple fractures on the right lower and upper limb;
 - ii. Amputation of the right lower limb;
 - iii. Multiple fracture and bruises on the upper right limb leading to affixation of two metal plates;
 - iv. Injury to the right eye leading to impaired vision;
 - v. Compressed burst L4 verebra with restro pulsed fracture fragments;
 - vi. Deep bruising on the chest due to dragging on tarmac.
42. The Respondent also relied in the case of *James Joseph Rughendo v. Kenya Power and Lighting Co. Ltd* [2011] eKLR where the Plaintiff was awarded Kshs. 3,000,000/= in general damages for suffering bilateral electrical damage to the upper limbs radial, ulna and median nerve, third degree electrical burns involving the palms of both hands at 40% burns surface, gangrene right leg just below the knee and gangrene left foot dorsal aspect, bit toe and 2nd toe, and right knee amputated.
43. Finally, the Respondent relied on the case of *Macharia Francis Mundui & Another v. Joel Wanje* [2017] eKLR, where the Plaintiff was awarded Kshs. 3,000,000/= in general damages for suffering the following injuries:
- i. Major severe crash injury if the left leg in the region of the thigh and knee.
 - ii. Complete fracture of the left femur. This fracture healed after conservative treatment.
 - iii. Extensive avulsion wound on right thigh. He lost a lot of skin and muscles. X-rays done revealed presence of fracture of the right femur. Surgical toilet was done and later skin grafting of the extensive wounds done.
 - iv. Deep abrasions on back of the right hand. This wound was done surgical toilet and dressed.



44. It goes without saying that no two accidents will ever result in exactly the same injuries or the same set of injuries. Accordingly, it is the duty of the court, on the basis of its best appreciation of the various authorities cited and using its closest approximation of the compensable value of the injuries in the case before it relative to those cited in authorities, and given the passage of time, to pronounce itself on the appropriate compensation.
45. In my view, the injuries in the cases cited the Appellants were less complicated and extensive than the injuries sustained in the present case as they did not involve any amputation or assessed degree of incapacitation. On the other hand, the injuries in the cases cited by the Appellant were more complex compared to this case. For example, the injuries suffered by the Plaintiff in the case of Abdi Werdi Abdulahi (supra) included amputation of a limb while in the case of James Joseph Rugendo's case (supra), the plaintiff sustained a permanent incapacity of 70%.
46. The award of Ksh.1,500,000/- was made in *Nelson Njihia Kimani v. David Marwa & Anor.* (2017) eKLR where there was an amputation of lower right limb with only 40% incapacity. In the case of *Joseph Seremani & Julius Otachi v Stella Bosibori Moreka* Civil Appeal No. 100 of 2018 [2019] eKLR, the court sustained an award of Kshs. 2,500,000/= where the respondent had multiple fractures and an amputation of the left leg. In *Akwaba Olubuliera Nicodemus v Dickson Shikuku* [2020] Civil Appeal No. 169 of 2018 eKLR the court upheld general damages of Kshs. 2,000,000/= where the plaintiff had suffered a fracture of the right clavicle leading to internal fixation of the clavicular fracture; crush injury to the right leg leading to below knee amputation of the right leg and sprained left elbow joint.
47. In my view, the injuries sustained by the Respondent herein are more comparable to those in the cases of *Joseph Seremani & Julius Otachi* (supra) and *Akwaba Olubuliera Nicodemus* (supra). Although the injuries sustained by the Respondent may not have a disastrous effect on his livelihood as a teacher, they were clearly severe and will have long term consequences on his life.
48. Having considered the above decisions, it is my view that the trial magistrate erred in not fully considering the nature and extent of the Respondent's injuries to arrive at the award of Kshs.3,000,000/= which I find to be excessive in the circumstances, and therefore an erroneous estimate. Taking into account the authorities I have cited above and the applicable principles in awarding damages for personal injury claims, it is my view that the appeal should succeed on this ground.

On Special Damages

49. It is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court. In *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – as he then was, emphasised that:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
50. The rationale for requiring a party to plead and prove special damages was given by the Court in *Jackson Mwabili vs. Peterson Mateli* [2020] eKLR, as follows;

“....the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put



him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.” [Emphasis added]

51. In this case, the Respondent pleaded special damages of Kshs. 2,169,037/=. The trial court award Kshs. 1,133,440/= as the total of the receipts produced and proved. From my calculation, the following amounts have been proved:
- i. Kshs. 10,000/= for demand letter;
 - ii. Kshs. 550 for copy of records;
 - iii. Kshs. 20,000/= for medical report by Dr. Nicholas Mbui;
 - iv. Kshs. 30,000/= for metal implants;
 - v. Kshs. 108,718/= for medical expenses at PCEA Chogoria hospital; and
 - vi. Kshs. 724,173/= for medical expenses at St. Theresa Mission Hospital (Kshs. 49,999 in cash and Kshs. 674,174/= from bank account)

Conclusion

In the circumstances I order as follows:-

1. The Judgment of the trial magistrate on the award of general damages for pain and suffering is set aside.
2. Liability - 100% is upheld
3. I award general damages for pain and suffering at - Ksh.1,500,000/-
4. Special damages - Kshs.893,441/-
5. Costs to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JANUARY 2024.

L.W. GITARI

JUDGE

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