



**Munyi v Karira & 3 others (Civil Appeal E610 of 2022)
[2024] KEHC 9672 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E610 OF 2022

S MBUNGI, J

JULY 30, 2024

BETWEEN

JOHN NJERU MUNYI APPELLANT

AND

JAMES KARIRI AKA KARIRA 1ST RESPONDENT

KELLYANN WANJIKU NJIRIRI 2ND RESPONDENT

HOUSE OF GENERAL MERCHANTS LTD 3RD RESPONDENT

SADIQ CO. LTD 4TH RESPONDENT

*(Appeal against the Judgement of Hon. J. P. A. Aduke (Ms.) – SRM
delivered on the 26th July, 2022 at Milimani CMC. Case No. 957 of 2014)*

JUDGMENT

1. The Appellant being dissatisfied with the Judgement of Hon. J. P. A. Aduke (Ms.) - SRM delivered on the 26th July, 2022 in Milimani CMC. Case No. 957 of 2014, filed the Memorandum of Appeal dated 2nd August 2022; the Record of Appeal dated 4th April, 2023 and received in court on 19th April 2023, seeking the following orders:
 - i. The appeal be allowed with costs.
 - ii. The trial Court award of general damages for pain, suffering and loss of amenities be set aside and be substituted with such higher/enhanced award as this court may assess as just and reasonable.
 - iii. This court do make an award for future medical costs.



- iv. This Court do make an award for special damages with interest thereon from the date of filing suit to date of full payment.
 - v. This Court do find the 2nd Respondent liable together with the co-defendants.
 - vi. Such further relief as Court may deem just and expedient.
2. The Appeal was premised on the following grounds: -
- i. The trial Court erred by failing to address the issues raised in the matter.
 - ii. The trial Court erred by failing to consider the Appellants written submissions.
 - iii. The trial Court erred by failing to notice that the 2nd defendant/2nd Respondent had been sued as owner or person who had possession of motor vehicle KAT 955W and not KAW 823M.
 - iv. The trial court erred by not considering the police abstract produced which named the 2nd defendant as owner of motor vehicle KAT 955U and the authorities cited on the issue of proof of ownership by a police abstract.
 - v. The trial Court erred by confusing ownership with directorship of a company.
 - vi. The court erred by making an award of general damages for pain, suffering and loss of amenities of life which was too low or mean or did not accord with principles of assessment of such damages.
 - vii. The trial court erred by ignoring medical, oral and documentary evidence of future medical costs or by failing to make an award for future medical costs.
 - viii. The trial court erred by declining an award for special damages on account of lack of stamp duty receipts on the receipts.
 - ix. The trial court erred by misapprehending the Law applicable to the issues raised in the case.
- (Pg. 1-2 of Record)

Background to the appeal

3. The Appellant vide the Amended plaint dated 19th January 2011 sought before the trial magistrate court the following reliefs:-
- a. General Damages for:
 - i. Pain suffering and loss of amenities of life
 - ii. Future medical costs.
 - b. Special damages Kshs.232,720/-
 - c. Costs and Interest.
4. The plaint had been accompanied by a list of witnesses dated 20th May 2011, the Appellant's Witness statement dated 30th July 2020, his list of Documents dated 20th May 2011, and his bundle of documents(Pg. 3 – 24 of the record are all pleadings by the Appellant before the lower court).
5. The claim was opposed. The 2nd Respondent/2nd Defendant filed a Statement of Defence(subject to leave granted on 5th April 2011) dated 11th April 2011(Pg.-25-26). The 1st, 3rd and 4th Respondents/



Defendants did not enter appearance in the lower court and an interlocutory judgement was entered against them(pg.30).

6. The matter proceeded by way of viva voce evidence virtually on 14th February 2022. The Appellant testified as PW3, Surgeon Washington Wokabi testified as PW2 and PC Biwott testified as PW1. The Defendants did not call any witnesses. (Pg. 37-41). The plaintiff filed submissions in the lower court(Pg. 45-91). The judgement was delivered on 26th July 2022 (Pg. 92-94). The trial magistrate entered judgement in favour of the Appellant as follows: “...taking into account that no amount of damages can restore the plaintiff to what he was prior to the said accident, the rate of inflation and cost of living/prevailing global economic recession, I hereby award KES 7000,000/-as all-inclusive damages in conclusion, I enter judgement in favour of the plaintiff as follows:-1. General damages KES 700,000/-2. Future medical expenses-NIL.3. Special damages-NIL. 4. Costs of the suit5. Interest on 1 and 4 above at court rates” (pg.93-94)

Written Submissions At Appeal

7. The court directed that the appeal be canvassed by way of written submissions. The Appellant’s written submissions drawn by Nelson Kaburu and Company Advocates were dated 6th November 2023. The Respondents did not file any submissions.

Determination

8. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a 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 bound necessarily 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.”

9. Further in *David Kaburuka Gitau & Another v Nancy Ann Wathithi Gatui & Another Nyeri HCCA No. 43 of 2013*, the court opined:- ‘Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions.’”

Issues for determination

10. The Appellant in his submissions identified the following issues for determination in the appeal:-
 - a. Finding on 2nd defendant/2nd respondent’s liability.
 - b. Whether the award of damages for pain, suffering, and loss of amenities should be set aside.
 - c. Whether trial court erred by declining an award for future medical costs.
 - d. Whether trial court erred by declining an award for special damages.



11. The court having considered the parties pleadings in the lower court and the appellant's submissions in the appeal, finds that the issues placed by the Appellant for determination in the appeal are on liability and on quantum of damages and formulates the issues for determination in the appeal as follows: -
 - a. Whether the default judgement against the 3rd and 4th Defendants was regular.
 - b. Whether the trial magistrate arrived at a proper finding of the liability of the 1st and 2nd Respondent.
 - c. Whether the trial court arrived at the wrong finding regarding future medical costs.
 - d. Whether the trial court made a wrong finding on the admissibility of receipts where no stamp duty was not paid.

Appellants' submissions

12. The appellant submits that the 2nd Respondent was sued as the owner or the person who was in possession and control of the Motor vehicle KAT 955U and she was sued on a vicarious basis for the acts of the 1ST respondent who was the driver of the 2nd defendant's vehicle. the appellant submits that the co-defendants 3rd and 4th, were sued as owner or driver of Motor vehicle KAW 823M and default judgement against the two had been entered. Default judgement was also entered against the 1st Respondent.
13. The appellant submits that the trial court misunderstood the evidence by the appellant by finding that the copy of records produced for motor vehicle KAW 823M had no nexus to the 2nd respondent, yet the appellant had pleaded that the 2nd respondent had no nexus with the KAT 955U.
14. He submits that the trial court found that the police abstract was produced with no objection, and the court should have found that the 2nd respondent was the owner of the Motor vehicle KAT 955U as named in the same abstract.
15. He submits that the position where the production of the police abstract is uncontroverted was settled in the case of Joel Muga Opija V East African Sea Food Ltd (2013) eKLR.
16. He submits that the trial court's proceedings had indeed been stayed by the 2nd Respondent's insurer Ms. Corporate Insurance Co. Ltd in Nairobi HCCC No. 675 of 2010, where its insurer sought to avoid liability to pay for the 2nd Respondent.
17. He submits that the trial court failed to consider the proceedings, as there was no way the 2nd respondent could have insured a vehicle she had no insurable interest over. He submits that the 2nd respondent did not contest ownership of the motor vehicle and the trial court failed to consider that the 2nd respondent had been named in the abstract as owner and she did not controvert it.
18. The appellant submits that the trial court erred in holding that the 2nd Respondent was not vicariously liable for her driver's negligence when the motor vehicle was been driven for her gain relying on the decision in Karisa v Solanki (1969) E.A. 318.

Quantum

19. As to quantum, the appellant submits that the trial magistrate's award was too low, it failed to consider comparable awards, and it failed to take into account multiple fractures. The appellant suffered permanent disability and inflation.



20. The appellant submits that he suffered four fractures, operation and fixation of metal implant, loss of teeth, and extensive skin and muscle loss. The appellant submitted that the respondent did not file its submissions on its proposed award and the appellant seeks that the court to award Kshs. 3,000,000/= as per its submission in the lower court (Pg.45-93). (Simon Muchemi Atako & Another v Gordon Osore (2013) Eklr.

Future medical costs

21. The appellant submits that the trial magistrate erred in finding that the appellant had not pleaded future medical costs (pg.93) yet, the medical report of Dr. Wokabi (pg.16-17 of record) outlined the future medical cost of Kshs. 150,000/-for removal of the metal implant and Kshs. 50,0000 for dental costs.
22. The appellant submits that he produced a receipt of Kshs. 2,000 for the medical report, and witness expenses of 10,000 which were not recorded in the court record.
23. The appellant submits that he filed his list of documents in the trial court which had the medical report as item 5 yet the trial magistrate found that there was no medical report, but went ahead to assess general damages, which could not have been possible without the medical report.
24. The appellant asks this court to find that the medical costs were pleaded and to grant them at Kshs. 200,000/-.

Special Damages

25. The appellant submits that on Special Damages, the trial magistrate found that the receipts of Kshs. 221,995/- did not bear stamp duty and refused to award them without considering the binding court of appeal decision in Paul N. Njoroge V Abdul Sabuni Sabonyo (2015) eKLR.
26. The appellant submits that the trial magistrate failed to consider set legal principles arriving at the wrong finding and asks the court to allow the appeal with costs.

Analysis.

27. This being a first appeal, this court is duty-bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows in this regard-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

28. It is not disputed that the appellant sustained injuries on 18th December 2007 along the Nairobi -Nakuru Highway while he was a passenger of KAT 955U in an accident that involved another motor vehicle KAW 823M which as per the copy of records (pg. 19 of record) was owned by the 3rd Respondent.

a). Whether the default judgement against the 3rd and 4th Defendants was proper

29. The trial magistrate indicated that default judgement was entered against the 1st Defendant on 20th July 2011 and against the 3rd and 4th Defendants on 8th November 2010.



30. The Record of proceedings indicates that default judgement against the 1st defendant was entered on 19th July 2011, there appears to be a typing error as to the date in the lower court file being either 18th July 2011 or 19th July 2011(pg.30 of record).
31. The Trial magistrate held that default judgement against the 3rd and 4th Respondents was entered on 8th November 2010. The date appears as 5th November 2020 also (pg. 28 of Record). Of importance to note is that the record does not indicate that the judgement was entered against the 3rd and 4th respondent. Only that the same default judgement was entered as against the 2nd Respondent only.
32. I have perused the lower court file and found a request for judgment against the 1st Defendant / respondent dated 20th May 2011 and filed in court on 6th July 2011. The request for judgement against the 2nd , 3rd and 4th Respondent was dated 13th October 2010 and filed in court on 1st November 2010.
33. On perusing the said request for judgment dated 13th October 2010, judgment was entered only against the 2nd Respondent and not against the 3rd and 4th Respondents as directions at the bottom of the said request directed that service upon the 3rd and 4th Respondent/defendants be done in compliance with the rules of service on a corporation.
34. There is no further record whether the Appellant served upon the 3rd and 4th Respondent or whether there was a further Request for judgement as regards the two respondents.
35. The court of appeal in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR held that:

“The approach of the courts where an irregular default judgment has been entered is demonstrated in the following cases. In *Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010*, the High Court expressed itself thus:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

Earlier in *Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J.* (as he then was) had expressed the principle thus:

“[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process”.

36. There was no proof that the appellant made further efforts to serve the 3rd and 4th Respondents and no default judgement was entered against the 3rd and 4th Respondent. .as held in *James Kanyiita Nderitu(supra)*.... “If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae.”



37. The 3rd and 4th Respondents did not have a chance to participate in the proceedings before the trial court,
38. The Trial magistrate failed to consider that there was no record of a default judgement having been entered and no proper service had been effected before finding in its judgment that one had been entered. The import of this is that the judgement against the 3rd and the 4th Respondents was irregular and no liability would accrue to the 3rd and 4th respondents, the appellant having not effected proper service and this the trial magistrate proceed on the wrong premise of that there was a proper judgment against the 3rd and 4th respondents.

b). Whether the trial magistrate arrived at a proper finding of the liability of the 2nd Respondent and 1st Respondent.

39. The trial court found that the 2nd Respondent had no liability in the accident as the copy of records of KAW823M showed that the 3rd Respondent was the owner but there was no proof that the 2nd Respondent was a director the company.
40. I agree with the appellant that the trial magistrate indeed mixed up facts because the abstract of 26th October 2009(pf. 140 indicated that the owner of KAT 955U was the 2nd Respondent and the 1st Respondent was the driver of the said vehicle. There was no pleading that the 2nd respondent was a director of the 3rd Respondent.
41. Although the 2nd respondent filed the statement of defence dated 11th April 2011(pg. 25-26 of Record) denying she was the owner of the Motor Vehicle KAT955U.
42. I have perused the Lower court file and, in her Chamber summons dated 12th January 2011, seeking leave to file a defence, the 2nd Respondent confirmed that she had forwarded her claim to the insurer after the accident to assume liability, which resulted in her delay in filing suit. The Appellant did not obtain a copy of records for the KAT955U but on a balance of probability, the 2nd Respondent was the insured of the motor Vehicle KAT955U.
43. As to whether the 2nd respondent was liable for the negligence of the 1st Respondent who was the driver of the said Motor vehicle.
44. As per the abstract of 26th October 2009, KAW 823M IS A Canter, KAT 955U is an Isuzu Pickup (pg. 14 of record).
45. The appellant was aboard KAT 955U at the time of the accident. He testified that at the time of the accident the vehicle was selling milk (“... the date of road traffic accident, gari ilikuwa inauza maziwa...” (pg.40 of Record).
46. He further testified that he was not an employee of the 2nd respondent but knew her from Kirinyaga Road where she used to sell milk. There was no testimony as to why the appellant was present on the said motor vehicle. He pleaded that he was a passenger in the motor vehicle KAT 955U when the defendant negligently prove the vehicle causing the accident that resulted in his injuries.
47. In *Mary Waitherero vs Chella Kimani and Another* [2006] eKLR, Kimaru, J cited *Marsh vs Mowes* [1949] 2kb 208, 125 as follows: -

“It is well settled law that a master is liable even for acts which he has not authorised provided that they so connected with the acts which he has authorized that they may be regarded as modes, although improper modes of doing them. On the other hand, if the unauthorized



and lawful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of the employment but has gone outside it.”

48. The Motor vehicle KAT 955U was a pickup and not a public service Vehicle. The appellant did not plead why he was in the said motor vehicle save that he was a passenger. For the appellant to prove that the respondent is liable for the negligence, he must prove he was an authorized passenger in the motor vehicle. The trial court did not go into this merit. The appellant testified that the motor vehicle was selling milk at the time of the accident. He did not testify that the same motor vehicle was ferrying passengers.
49. The appellant having proved that he was in the motor vehicle as a passenger and yet he was not an employee of the 2nd respondent even though he was allowed by the 1st Respondent, which case is not pleaded either, then the 2nd Respondent could not have been responsible for the un-authorized presence of the appellant in the said motor vehicle.
50. The appellant having failed to prove that he was an authorized passenger or an employee of the respondent to have been allowed to board the motor vehicle, he failed to prove on a balance of probability that he was owed a duty of care by either the 1st or 2nd Respondent.
51. The trial magistrate arrived at the proper finding that the 2nd respondent was not liable, although the basis of the trial magistrate’s decision was misdirected.

Liability against 1st respondent

The Court of Appeal’s position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

52. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

“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.”

45. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever



extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

53. A default judgment was entered against the 1st Respondent. The 1st Respondent was sued as an agent of the 2nd respondent and having found that the 2nd Respondent is not vicariously liable for the acts of the 1st respondent, as the appellant was an unauthorized passenger then 1st Respondent did not owe the appellant a duty of care as he assumed the risk of boarding a motor vehicle without authority.

c). Whether the trial court arrived at the wrong finding regarding future medical costs.

54. The trial court found that future medical costs were not pleaded. And no medical report was adduced on the same. The trial court found... “I note that this is a very old matter (2014) and as such the receipts and addendums may not all be on record/CTS in 2022. This amount of future medical expenses has not been pleaded and not proved.”

55. The law on the claim for future medical expenses was settled in the case of *Tracom Limited and another v Hassan Mohamed Adan* [2009] eKLR where the Court of Appeal stated that:

“We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this court, stated:-“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.” We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.” [Emphasis mine]”

56. The appellant asserts that he pleaded the future medical costs.
57. I have perused the plaint and true enough the appellant pleaded that he would require a permanent dental bridge at an estimated cost of Kshs. 50,000, and an operation cost to remove metal implants of Kshs. 150,000/- (Pg. 5 of Record). The same costs were also in the medical report by Dr. Wokabi (Pg. 17 of Record). During cross-examination PW-2 who was Dr. Wokabi and the author of the Medical report, was cross-examined by the Respondent on the exact cost of removal of dentures where confirmed that the cost had generally reduced (pg.39 and 40 of the Record).
58. In the circumstances and guided by the above authority, this Court finds that the appellant pleaded and proved the claim for future medical expenses of Kshs. 200,000 for dentures and removal of the metal implant, to the required standard and the trial magistrate erred in finding otherwise.



d). Whether the trial court made a wrong finding on the admissibility of receipts where no stamp duty was not paid.

59. The trial found that the claim for Kshs. 232,720 for special damages. He found that the receipts of Kshs. 221,995 did not have a stamp duty endorsed on them and as the defendant objected to their admissibility as they lacked the stamp duty stamp against the *Stamp Duty Act*, the trial magistrate found that the Appellant was not entitled to the special damages. The trial magistrate did not make a finding on the difference of the special damages of Kshs. 10,725/-. The medical report cost receipt of Kshs. 2,000/- was also produced (pg.18); receipt of motor vehicle copy of record of Kshs.500(pg.20)
60. The appellant produced the Discharge Receipt from AIC Kijabe dated 8^h April 2008 for a sum of Kshs. 221,995, a receipt of 21st May 2008 of Kshs. 2,690, receipt of 11th March 2009 of Kshs. 200, Receipt of 27th August 2008 of Kshs. 1,800, receipt of 22th April 2009 of Kshs. 1810, receipt of March 2009 of Kshs. 555/-, receipt of 22nd April 2022 of Kshs. 270, and Kshs. 200, all this totaled 229,520/-(pg.21 to 24 of Record).
61. The 2nd Respondent did not object to the costs save that there was no stamp duty payment on them (pg.41 of record).
62. The trial court found that there was no stamp duty paid on the receipts produced and held that the claim fails (pg.93 of Record).
63. The county in Juliet Kemunto Ondati v Gladys Mwendu [2021] eKLR held that: -

“ 36. The finding of the court in the above matter was informed by the decision of the Court of Appeal in Paul N. Njoroge Vs. Abdul Sabuni Sabonyo [2015] eKLR where the Court held as follows:

“21. The finding is often made by lower courts that documents which do not comply with the *Stamp Duty Act*, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR where it stated thus:

“Mr. Mbigi submitted that the guarantee document relied on by the Respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the *Stamp Duty Act*. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

“The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the *Stamp Duty Act* (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the



learned Judge was as in the case of *Suderji Nanji Ltd. -vs- Bhaloo* (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in *Bagahat Ram -vs- Raven Chond* (2) 1930) A.I.R Lah 854 that:

“before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ...

The Appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/Respondent and he must be given the opportunity”.

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the *Stamp Duty Act*. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.

22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer, Thetu Theuri Gitonga (PW7-sic), and the consultant physiotherapist, Paul John Mwangi (PW7), both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs. 38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof.”
37. The decision by the Court of Appeal is binding on this court as well as the trial court. Consequently, I find that the trial court erred in rejecting the receipts that had been produced by the appellant in support of her claim for special damages on the basis that she had not complied with the *Stamp Duty Act* as it had not given her an opportunity to pay the requisite stamp duty and penalty prescribed under the Act...”
64. Therefore, as per the holding above, the trial magistrate erred in finding that the receipts were inadmissible yet The Appellant was never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped documents on which he sought to rely in support of his claim.
65. The appellant could save for the finding on liability have been entitled to the award of the special damages of Kshs.232,720.



General damages.

66. The guide principles for an Appellate court in disturbing award of damages are to wit,
- “An Appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”
67. The trial court awarded Kshs. 700,000 to the appellant as general damages relying on the comparable award in *Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR and Van Den Berg Ltd) vs. Charles Osewe Osodo (2022) Eklr* stating that she had considered the rate of inflation, cost of living, and prevailing economic recession.
68. The appellant states that the trial magistrate’s award was too low, it failed to consider comparable awards, and it failed to take into account the multiple fractures the appellant suffered, permanent disability, and inflation.
69. The appellant stated that he suffered 30 % permanent disability and the following injuries: -
- i. Two missing incisors
 - ii. Fracture of the right humerus with fitted metal plate
 - iii. Fracture of right femur
 - iv. Fracture of left femur
 - v. Partial loss of left heel and was admitted for 4 months in hospital (pg.16 of Record).
70. The appellant seeks that court to award Kshs. 3,000,000/= as per its submission in the lower court (Pg.45-93) (*Simon Muchemi Atako & Another v Gordon Osore (2013) Eklr*).
71. The starting point is that comparable injuries should as far as possible be compensated by comparable awards, taking into account that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda, Nyeri CA Civil Appeal No.147 of 2002 [2004] eKLR* that: “Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
72. There is no dispute on the injuries suffered by the Appellant. The only question is whether the award of 700,000/- was too high as argued by the appellant, or should be enhanced to 3,000,000.
73. The high court in *Bonface Mugendi Njiru V Ochieng T/A Tohel Agencies & Another [2011] Eklr*, awarded Kshs. 1,000,000 as general damages where the plaintiff had suffered Blunt head injury with loss of consciousness for over 24 hours, Loss of four upper incisor teeth, Fracture of the shaft of right femur and Compound fracture of the right tibia with loss of soft tissues including tendons, and a metal implant was to be removed later.
74. The trial magistrate relied on the decision in *Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR and VAN Den Berg Ltd) Vs. Charles Osewe Osodo (2022) Eklr*. In *Joseph Mwangi (supra)* an award of 700,000 was given for injuries of Fractures right femur, Compound fracture (r) tibia, Compound



fracture right fibula, Shortening right leg and Episodic pain (r) thigh with inability to walk without support.

75. In Van Den Berg Ltd(supra) the court awarded Kshs. 1,000,000 for a plaintiff who suffered a Fracture of left radius, a Fracture of femur and Soft tissue injuries of pelvis.
76. The decision by the trial Magistrate was within the period of 2022 and considering that the appellant had contributed to his own misfortune then the trial court's award would have been within the comparable awards for the same injuries considering future medical costs were awardable independently.
77. In the upshot the court finds that:
1. The trial magistrate arrived at the proper finding on liability against the 2nd respondent
 2. The appellant did not prove his case against the 1st, 3rd and 4th respondents on a balance of probability.
 3. The award of Kshs 700,000 is set aside, the appellant having failed to prove liability against the respondents.
 4. The trial magistrate arrived at the wrong finding as relates future medical costs.
 5. The trial magistrate erred in his findings relating stamp duty on receipts.

The appeal fails with no order as to costs. Right of appeal within 30 days

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI

JUDGE.

In the presence of

Court Assistant:

Appellant :

Respondents:

