



**Otieno & another v Keraru (Civil Appeal E047 of 2023)  
[2024] KEHC 17034 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 17034 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E047 OF 2023  
TA ODERA, J  
NOVEMBER 22, 2024**

**BETWEEN**

**NORBET OTIENO ..... 1<sup>ST</sup> APPELLANT**

**MULI CONTRACTORS LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PATRICIAH NYANCHOKA KERARU ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Hon. C. A. OGWENO  
(SRM) on 9TH May, 2023 in KISII CMCC NO. 514 OF 2021)*

**JUDGMENT**

**Introduction.**

1. Being aggrieved by the Judgment dated of the lower court the Appellant filed the Appeal herein which was based on the following grounds of Appeal;
  - i. The learned trial magistrate erred in law and fact in awarding special and general damages that had not been proved.
  - ii. The learned magistrate erred in law and fact by awarding the Respondent Kshs.332, 370/= as special damages which were not proved to the required standard.
  - iii. The learned magistrate erred in law and fact by awarding the Respondent Kshs.2, 500,000/= as general damages for pain and suffering on amount which was excessive in the circumstances of this case.
  - iv. The learned magistrate erred in law and fact by awarding the Respondent Kshs.1, 000,000= as loss of earning capacity which was not proved and/or on amount which was excessive.



- v. The learned magistrate erred in law and fact by awarding the Respondent Kshs. 1,600,000= as future medical expenses and costs of on artificial limb which was not proved and/or an amount which was excessive.
  - vi. The learned trial magistrate erred in law and fact in over-relying on the evidence by the Respondent which was not corroborated in awarding damages hence arriving at a wrong decision.
  - vii. The learned trial Magistrate erred in law and fact by failing to consider the appellant's submissions and legal authorities relied upon in support of their defense
  - viii. The learned trial Magistrate erred in law and fact by over-relying on the Respondent's submissions and legal authorities which were not relevant to the suit and without addressing her mind to the circumstances of the case.
  - ix. The learned trial magistrate erred in law and fact by not evaluating and analyzing the entire evidence on record adequately.
  - x. The learned trial Magistrate's decision albeit, a discretionary one was plainly wrong.
2. Based on the above ground the appellant sought from this court the following orders:
- a. This Appeal be allowed with costs.
  - b. The judgment of the lower Court delivered on 9.5.2023 be set aside and same be substituted with proper finding/judgment.

**The Respondent to pay costs of this particular appeal.**

3. The background of the matter is that the Respondent filed a suit against the Appellant seeking;

**Background Of The Suit.**

4. Vide a plaint amended on 11<sup>th</sup> June 2021, the Appellant approached the trial court seeking a judgment against the Appellants jointly and severally for:
- a. General damages, for pain, suffering and loss of earning capacity.
  - b. General damages for future medical expenses and costs of fitting an artificial limb.
  - c. Special damages of Kshs 783,515/-
  - d. Costs of the suit.
  - e. Interest on a, b, c, d and e above at Court rates.
5. The Respondent's case was based on the tort of negligence against the Appellants following a road traffic accident that occurred on 29<sup>th</sup> October 2020 along Daraja Mbili area involving motor vehicle registration number KBX 433Z and the Plaintiff who was a pedestrian along the said road.
6. The Appellants in reply filed an amended statement of defense dated 2<sup>nd</sup> August 2021 denying the Respondent's claim and without prejudice, blamed the Respondent the plaintiff for the occurrence, loss and damages of the accident and prayed for the suit be dismissed with costs.



7. The trial court upon hearing the parties the trial court delivered a judgment wherein held as follows;

“The issue of liability was agreed by parties to have been settled in the Test Suit in Kisii CMCC 523 of 2020 where the Defendants were found 100% liable for the accident. Liability is therefore entered at 100 % in favor of the plaintiff herein.

#### Quantum

The P3 form and medical report by Dr. Peter Morebu show that the plaintiff sustained traumatic amputation of the right leg, degloving injury on the left leg, degloving injury on the left knee, degloving injury on the right thigh, chest contusion, blunt trauma to the back, mangled lower extremities, laceration of the right anterior and posterior tibial artery stenosis of mid 1/3 right popliteal artery with complete occlusion of the distal segment. The said findings are supported by the following reports:

- a. Medical Report from St. Luke Orthopedic & Trauma Hospital dated 09.11.2020.
- b. Clinical Summary from St. Luke Orthopedic & Trauma Hospital dated 02.11.2020.
- c. Transfer form from St. Luke Orthopedic & Trauma Hospital.
- d. Medical report dated 20/11/2020 from Coptic Hospital
- e. Discharge summary dated 24/12/2020 from Coptic Hospital.
- f. Discharge summary dated 16/01/2021 from Davinci Hospital.
- g. Referral letter from KTRH dated 31/10/2020.

The findings in all the medical reports were the same and confirmed the report by Dr. Morebu Peter Momanyi

The defense did not controvert the said injuries by way of a 2<sup>nd</sup> medical report. The Court thus proceeds to determine quantum based on the report by Dr. Morebu and other supporting medical records.

In determining quantum, the Court is guided by the decision of the High Court in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 (2004] eKLR) where it was held that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.

The plaintiff has submitted the sum of Kshs 3,500,000/- in general damages would be fair in the circumstances. She cited the following decisions: -

1. Daniel Kosgei Ngelechei versus Catholic Trustee Registered Diocese of Eldoret & Another [20137 eKLR, where the court awarded Kshs 2,100,000/- where the plaintiff sustained an amputation of the left lower limb above the knee, loss of two central incisors and other soft tissue injuries.



2. CM a minor suing through mother and next vs Joseph Mwangangi Maina (2018) eKLR where the Court awarded Kshs 2,000,000 for a minor who had sustained amputation of the left leg below the knee.
3. John Kipkemboi & another versus Morris Kedolo (2019) eKLR where the Court made an award of Kshs 2.5 million for injuries including amputation of the left leg below the knee and other soft tissue injuries.
4. Abdi Werdi Abdulahi versus James Royo Mungatia & another [2019] eKLR where the Court awarded the Plaintiff Kshs 3.5 million for amputation of the right lower limb, multiple fractures of the right lower and upper limb, injury to the eye leading to impaired vision, Compressed burst L4 vertebra, deep bruising on the chest and head trauma injuries leading to concussion.

The defendant on the other hand submits that an award of Kshs 750,000/- would be adequate in the general damages for the injuries suffered. The defence relied on the following authorities: -

Kisumu Concrete Products Limited versus Kennedy Onyango Olwa [2016] eKLR where the Court awarded the sum of Kshs 750,000/- for similar injuries.

I have considered the other comparable authorities. The Court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR reviewed an award of Kshs 3 million to Kshs 2.5 million for a child plaintiff aged 5 years at the time of the accident lost his right leg above the knee by amputation.

Similarly, the Court in *Duncan Kinyua & another v. Boniface Kigunda* [2020] eKLR in which Kshs. 1,800,000/- was awarded for general damages where the Plaintiff sustained a lower limb extending from the distal femur to the amputation of the right-little finger. The principles for compensation for personal injury are principally three-fold that:

1. Compensation for personal injury suffered, so far as money can do so, to restore the plaintiff to his position before the accident.
2. Comparative awards for comparative injury.
3. Compensation figures should not be so high as to threaten the economy.

The Plaintiff herein was 36 years old at the time of the accident. She was admitted in 3 various hospitals from 29.10.2020 to January 2021. The right leg was amputated from the knee joint. She underwent three surgeries for debridement of the stump and the left leg. There was complete occlusion of the distal popliteal artery. She also had degloving injuries of the left leg, left thigh and left knee. Permanent disability was assessed at 60%.

I have taken appreciation of the various authorities and using its closest approximation of the compensable value of the injuries in the case before me, relative to those cited in authorities, and given the passage of time as well as inflation, I award general damages to the plaintiff in the sum of Kshs 2,500,000/= to be reasonable compensation in the circumstances.

General damages for loss of earning capacity.

The Plaintiff states that she was earning Kshs 20,000/- per month as a farmer. In addition, she earned Kshs 27,000/- monthly under the employment of One Acre Fund. She states that her earning capacity has been diminished as a result of the amputation.



The Plaintiff did not produce any proof of income to support her claims that she earned Kshs 20,000/- and Kshs 27,000/ as above stated.

In the case of Mumias Sugar Company Ltd v Francis Wanalo

[2007] eKLR the court observed: -

" ..... Loss of earning capacity can be claimed and awarded as part of general damages or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, a judge has to apply the correct principles and take relevant factors into account in order to ascertain the real or proximate financial loss that the plaintiff has suffered as a result of the disability."

In the case of Fairly v John Thompson Ltd [1973] Lloyds's Rep 40 at 41 the court drew distinction between loss of earnings and loss of earning capacity and held: -

"It is important to realize that there is a difference between an awards for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for future earnings are awarded for real assess by evidence. Compensation for capacity is awarded as part of general damages."

Loss of future earning capacity may be awarded as part of the general damages or as a separate head of damages. Counsel for the Plaintiff has proposed an award of Kshs. 6,000,000/= under this head adopting the multiplier - multiplicand approach.

The High Court in Nyamira in Monyoro Mong'are Shem & another v Timothy Nyagaka Nyagaka [2021] eKLR cited with approval the decision of the Court of Appeal in Mumias Sugar Co. Ltd v Francis Wanalo (Supra) which was decided way back in 2007. The Court of Appeal awarded Kshs. 500,000/=. The Court awarded the Plaintiff a sum of Kshs. 800,000/= under this head and set aside the award of Kshs .5,400,000/=.

The Plaintiff herein was said to be the sole breadwinner of her family. She is said to be a farmer. This is a physical and strenuous activity that cannot be carried out by the Plaintiff in her current condition. Her earning capacity has been obviously diminished. It is only right that she be compensated for this loss.

I have carefully considered the submissions by parties on damages under this head. The Plaintiff is no doubt entitled to an award for loss of earning capacity. However, the proposal by Counsel for the Plaintiff for the sum of Kshs 6 million is inordinately high. I allow the sum of Kshs 1,000,000/- under this head.

F. General damages for future medical expenses and costs of an artificial limb

Dr. Morebu testified that the plaintiff requires an artificial limb which need to be revised every 2 to 4 years for her entire life at an approximate cost of Kshs 400,000/-Dr. Morebu stated during cross examination that the cost of an artificial limb is provided for in a standard scale set out by the Ministry of Health. The said limb will be required to be changed due to wear and tear.

There was no evidence presented by the defence to challenge this evidence.

The Plaintiff was said to be 37 years old at the time of the accident, in the year 2020. She had already acquired a prosthetic limb to be replaced after 4 years, taking her to 2024, when she will be 41 years old. Her most active years will be up to the age of 60 years - 19 more years



– thus approximately 4 replacements, totaling to Kshs 1.6 million, which I award as future medical expenses and cost of the artificial limb.

#### G. Special damages

The Plaintiff claims Kshs 783,515/- in special damages. The Plaintiff produced invoices issued by Prof. S.K. Ominde dated 4<sup>th</sup> February 2021 and invoices from Davinci dated 05.01.2021 and 31.12.2021. However, it was not indicated whether the same were paid or not.

The Court of Appeal in *Total [Kenya] Limited Formally Caltex Oil (Kenya) Limited v Janevams Linlited [2015] eKLR* held as follows:

“proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”

I therefore, decline to allow claims as per the identified three invoices. I allow as proven the sum of Kshs 332,370/- only in special damages.

#### H. Conclusion

Judgment is hereby entered in favor of the Plaintiff against the defendants jointly and severally as follows: -

- a. Liability at 100% in favor of the plaintiff as against the defendant.
  - b. General damages for pain and suffering at Kshs. 2,500,000/-
  - c. General damages for loss of earning capacity at Kshs 1,090,000/-
  - d. General damages/or future medical expenses and costs of- an artificial limb at Kshs 1,600,000/-
  - e. Special damages of Kshs 332,370/-
  - f. Costs of the suit.
  - g. Interest on (b), (c), (d) and (e) at Court rates from the date of judgment till payment in full.”
8. It is against this holding that the Appellant has approached this court in the manner hereinabove highlighted.
  9. This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions which I have considered in my determination herein below.

#### **Issues Of Determination.**

10. Having analyzed the grounds of Appeal, reviewed the written submissions of the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues for determination are;



- a. Whether learned magistrate erred by awarding the Respondent Kshs.2, 500,000/= as general damages for pain and suffering.
- b. Whether the learned magistrate by awarding the Respondent Kshs. 1,000,000/= as loss of earning capacity.
- c. Whether the learned magistrate by awarding the Respondent Kshs. 1,600,000/= as future medical expenses and costs of on artificial limb.
- d. Whether learned magistrate erred by awarding the Respondent Kshs.332, 370/= as special damages.

### **Analysis And Determination**

Whether learned magistrate erred by awarding the Respondent Kshs.2, 500,000/= as general damages for pain and suffering

11. The principles under which an appellate court can interfere with an award of general damages made by a trial court were set out by the Court of Appeal in the case of *Kemfro Africa Limited T/A Meru Express Services [1976]* and another v *Lubia and another (No.2) [1985]* eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage. See *Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T)*; *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K)*. This Court follows the same principles.”

12. Equally in the case *Shabani v City Council of Nairobi [1985] KLR 516* at page 518, Hancox, JA stated as follows:

“The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan, Civil Appeal No. 40 of 1997* (a case referred to in another context by the learned Judge), as follows:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low.’

This discretion has since been followed frequently by this Court.”

13. The learned counsel for the Appellant in his submissions argued that the award of 2,500,000 as a general damages was inordinately high was inconsistent with comparable awards made in similar cases. The learned counsel thus urged the court to review the award and increase the same to Kshs. 750,000 taking into account comparable precedents and the rate of inflation. In support of his case the learned counsel relied among other cases the case *Kisumu Concrete Products Limited versus Kennedy Onyango Olwa [2016] eKLR* where the Court awarded the sum of Kshs 750,000/ for injuries he contended were similar to the one the Respondent suffered.



14. The learned counsel for the Respondent on the other submitted that the trial court's award was commensurate to the injuries suffered by the appellant. He contended that the same was in line with past awards with comparable injuries. He relied on the cases of;
- a. Daniel Kosgei Ngelechei VS Catholic Registered trustee of Eldoret and another (2013) eKLR where the court awarded a plaintiff who had suffered amputation of the lower left limb, loss of two incisors among other injuries a sum of Kshs. 2,100,000 as general damages for pain and suffering
  - b. CM (minor suing through mother and next friend, MN) VS Joseph Mwangaingi Maina (2018) eKLR where the court awarded 2,000,000 as general damages for pain and suffering to a minor who sustained serious injuries on her leg leading to the same being amputated below the knee.
  - c. John Kipkemboi and another vs Moris Kedolo (2019) eKLR where a victim who has sustained several injuries leading to amputation of his left leg below the knee being amputated was awarded Kshs 2,500,000 as general damages for pain and suffering.
  - d. Abdi Werdi Abdulahi versus James Royo Mungatia & another [2019] eKLR where the Court awarded the Plaintiff Kshs 3.5 million for amputation of the right lower limb, multiple fractures of the right lower and upper limb, injury to the eye leading to impaired vision, Compressed burst L4 vertebra, deep bruising on the chest and head trauma injuries leading to concussion.
15. The trial court relied on the following cases Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR where the court reviewed an award of Kshs 3 million to Kshs 2.5 million for a child plaintiff aged 5 years at the time of the accident lost his right leg above the knee by amputation and the case of Duncan Kinyua & another v. Boniface Kigunda [2020] eKLR in which Kshs. 1,800,000/- was awarded for general damages where the Plaintiff sustained a lower limb extending from the distal femur to the amputation of the right-little finger.
16. I have considered the medical evidence produced during the hearing of the plaintiff which were never contested by the Appellant, the testimony of Dr. Morebu who examined the appellant, the past authorities relied upon by all the parties and those relied upon by the trial court. I have also noted that the appellant it is important to point out that the authority that Appellant was decided in the year 2016. I have equally considered the inflation factor and the recent comparable awards for similar injuries and I find that the general damages awarded were adequate considering the serious nature of the injuries sustained by the respondent. I do not find the award to be so inordinately high warrant this court to disturb it.

**Whether the learned magistrate by awarding the Respondent Kshs.1, 000,000= as loss of earning capacity**

17. The learned counsel for the Appellant submitted the respondent failed to produce any proof that as result of the injuries sustained there was diminished ability to work and earn a living as a farmer or as an employee at One Acre fund. The learned counsel relied in the case of Paul Njoroge vs Abdu Saburi Sabonyo (2015) eKLR where the court declined to consider a claim for loss of earning capacity because the claimant who was still a police officer had not shown that his employment was affected.
18. The learned counsel for the appellant however conceded that loss of earning capacity can indeed be claimed and awarded as part of the general damages for pain and suffering and loss of amenities or under a separate head of damages. He underscored the award of the same has no formula of assessment and thus he proposed an award of Kshs. 300,000 as the sufficient head for this head. He relied in the



case of Mbasu and another vs Swaka (Civil Appeal No. E061 (2024) KEHC 2210 (KLR) where a 30 year old boda boda was awarded Kshs. 300,000 for diminished earning capacity. The learned counsel contended that the award of Kshs. 1,000,000 was excessive and the same should be substituted with a proper award.

19. The Appellant having conceded that grant of earning capacity can awarded as part of general damages or under a separate head just like the trial court had observed I proceed to find that the court did not err in awarding the same.
20. However, the Appellant argues that the trial court erred in awarding 1,000,000 which according to him was excessive. The trial court held as follows regarding this issue;

Loss of future earning capacity may be awarded as part of the general damages or as a separate head of damages. Counsel for the Plaintiff has proposed an award of Kshs. 6,000,000/= under this head adopting the multiplier - multiplicand approach.

The High Court in Nyamira in Monyoro Mong'are Shem & another v Timothy Nyagaka Nyagaka [2021] eKLR cited with approval the decision of the Court of Appeal in Mumias Sugar Co. Ltd v Francis Wanialo (Supra) which was decided way back in 2007. The Court of Appeal awarded Kshs. 500,000/=. The Court awarded the Plaintiff a sum of Kshs. 800,000/= under this head and set aside the award of Kshs .5, 400,000/=.

The Plaintiff herein was said to be the sole breadwinner of her family. She is said to be a farmer. This is a physical and strenuous activity that cannot be carried out by the Plaintiff in her current condition. Her earning capacity has been obviously diminished. It is only right that she be compensated for this loss.

I have carefully considered the submissions by parties on damages under this head. The Plaintiff is no doubt entitled to an award for loss of earning capacity. However, the proposal by Counsel for the Plaintiff for the sum of Kshs 6 million is inordinately high. I allow the sum of Kshs 1,000,000/- under this head.

21. In the case of which the applicant has relied on to support his proposal of Kshs. 300,000 as the adequate award under this head the court held as follows;

The respondent, in this case, was 30 years old at the time of the accident and was working as a boda boda rider. Having considered his injuries as well as the opinion of Dr. Andai, who assessed his disability at 50%, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished. In John Kipkemboi & Another vs Morris Kedolo [2019] eKLR where the Respondent suffered the amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/- for loss of earning capacity. In this case, had the respondent filed a cross-appeal against this head, I would have been persuaded to interfere with the finding of the trial court. There being no cross-appeal before the court, I find no reason to interfere with the sum of Kshs 300,000/-.

22. My understanding of the above ruling is that the Learned Judge would have enhanced the award of Kshs. 300,000 to 1,500,000 had the Respondent filed a cross-appeal. The award of Kshs of 1,000,000 / = is within the range of recent awards for similar circumstances and so I find no reason to interfere with the same.



**Whether the learned magistrate by awarding the Respondent Kshs. 1,600,000/= as future medical expenses and costs of on artificial limb.**

23. The learned counsel contended that in as much as the learned trial court relied on the evidence of Dr. Morebu, who testified that the cost of a prosthetic limb is Kshs. 400,000 which sum he said was a standard figure he did not produce the same. He argued too that a claim for future medical expenses being special damages required to be pleaded and proved in equal measure. He also argued that the cost of the prosthetic limb was already incurred the same was part of the special damages. He argued further that the respondent did not adduce evidence that she will require replacements within 2 to 4 years. It is equally fallacious for learned counsel who had argued that the Respondent was not entitled to special damages to argue that that the Respondent having already acquired a prosthetic limb she should not be awarded any other damages going into the future. Equally I find the argument that the scale for calculating the cost of the prosthetic limb at Kshs. 400,000 was not provided by Dr. Morebu not to hold water because the Appellant did not raise the same during the cross-examination of Dr. Morebu nor was it an issue raised in the written submissions filed by the Appellant in the lower court. With all due respect, I have gone through the amended plaint filed by the appellant and I have in deed established that in deed the Respondent did plead that she would in future require artificial limb to support her mobility. Dr Morebu testified that artificial limbs were required to be replaced at every 2-4 years and this was not challenged at all in the lower court witness. The respondent was 36 years at the material time and the opinion of 4 prostheses was thus reasonable. I find that the claim for artificial limbs was claimed and proved. I uphold award the cost of the prosthesis at Kshs 1,600, 000/=.
24. Based on the above observation, I find no substantial reason to warrant an interference with court finding under the head of future medical expenses and c.

**Whether learned magistrate erred by awarding the Respondent Kshs.332, 370/= as special damages**

25. It is trite law that Special Damages must be pleaded and strictly proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
- “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.”
26. Courts have insisted that a party must present actual receipts of payments made to substantiate loss. As was correctly stated by the trial court is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd.)
27. The learned counsel for the appellant contended that the sum of 332,370 included costs that were not proved. He argued that he had in his submissions at the trial court pointed out that all exhibits produced as Pexh 9 were pro forma invoices as opposed to payment receipts and thus the same should not have been relied upon by trial court to award special damages.



28. The learned counsel submitted further that the receipts produced as prove for special damages before court same did not comply with section 18 and 19 of the Stamp duty Act that requires any receipts for special damages requires to be stamped for stamp duty assessment.
29. I have taken the task of going through the all the exhibits and as correctly pointed by the trial court the plaintiff aside from the pro- forma invoices did produce medical/treatment payment receipts totaling to Kshs. 332,370 and therefore it is not true as the Appellant claims that there were no receipts.
30. Further the argument that receipts did not comply with the stamp duty Act hence inadmissible as prove for a claim for special damages has been held to be an erroneous one by courts. For instance, the Court of Appeal in the case of PAUL N. NJOROGGE vs. ABDUL SABUNI SABONYO [2015] eKLR 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 2<sup>nd</sup> 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.”

31. The above notwithstanding, I note that the learned counsel for Appellant did not in any way challenge the production of the said receipts during the hearing of the plaintiff’s case for being non-compliant with the *stamp duty Act*. It is clear that the respondent expended the said monies but he was not given a chance to pay the stamp duty.
32. I therefore from my above analysis do find that the finding of the trial court rightly awarded the special damages and I do not see any reason to interfere with the same.
33. In the upshot, the findings of the lower court on quantum, special damages, loss of earning capacity, future medical expenses. I find that the appeal is devoid of merit and the same is dismissed with costs to the respondent.
34. It is so ordered.

**T.A ODERA**

**JUDGE**

**22.11.24**

Delivered Virtually In The Presence Of:

Kamau: I am for Appellant

N/A for Respondent

Court Assistant - Oigo

