



**DKM v Mwangangi (Civil Appeal 65 of 2021)
[2023] KEHC 18105 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 65 OF 2021**

**RK LIMO, J
MAY 29, 2023**

BETWEEN

DKM APPELLANT

AND

SAMUEL KYALO MWANGANGI RESPONDENT

JUDGMENT

1. This is an Appeal that arose from the Judgement of Hon. John Aringo delivered on 4th August, 2021 vide Kyuso PM'S Court Civil Suit No. 25 of 2017.
2. In that suit, the appellant suing as the father of a minor BM pleaded that the said minor was lawfully onboard motor vehicle registration No. KAW 378B driven along Mwingi –Kyuso road when it was involved in a self-involving accident. The Appellant blamed the driver of the said motor vehicle for negligence adding that as a result of the accident the minor suffered the following injuries: -
 - i. Unconsciousness
 - ii. Wound on the right lateral part of both legs.
 - iii. Fracture of the right femur
 - iv. Fracture of the left femur
 - v. Medial fibula fracture of the left leg
3. The Respondent filed defence but call no evidence to back it up.
4. The trial court evaluated the evidence tendered by the appellant and entered judgement in his favour. The Respondent was found 100% liable and the appellant awarded Kshs. 500,000 in general damages and Kshs. 5,000 as special damages.



5. The Appellant was dissatisfied with the trial court's judgment on quantum and filed this appeal vide a Memorandum of Appeal dated August 26, 2021 on August 27, 2021 raising the following grounds That;
 - i. The Learned Magistrate misdirected himself in both law and fact and arrived at a wrong conclusion.
 - ii. The Learned Magistrate erred in law and fact by awarding manifestly low special damages to the appellant contrary to the evidence before.
 - iii. The Learned Magistrate erred in law and fact and arrived at an award of quantum which is very low against the extent of the injuries sustained and proved by the court.
6. In his written submissions through Counsel, the Appellant contends that the award was too low and contends that an award in the region of Kshs. 3.5 million would have been commensurate with the injuries sustained.
7. The appellant has relied on the following authorities to back up his submissions: -
 - a. *Gabriel Mwashuma versus Mohammed Sajjad & Anor.* [2015] eKLR where the plaintiff was awarded Kshs. 3 million as general damages. The injuries however were far more serious than the present case. The Plaintiff suffered segmental left femur fracture, compound fracture of left patella and femoral condyle, fracture of distal tibia/fibula, fracture of right fibula and soft tissue injuries.
 - b. *Alex Wachira Njagua vs Gathuthi Tea Factory & Anor* (2010) eKLR

Where the court awarded Kshs 3,000,000/- being damages for pain and suffering. In the matter, the Plaintiff sustained the following injuries; blunt injury of the head with a contusion, fracture of the left tibia, fracture of the right fibula, cut wound of the forehead, bruised elbow and bruised knee. In the matter, it was pleaded that the Plaintiff became 100% incapacitated and mentally ill as a result of the injuries sustained following the accident. Similarly, the Plaintiff sustained more severe injuries than the Appellant.”
 - c. *Lucy Waruguru Gatundu vs Miriam Nyambura Mwangi* (2017) eKLR where the Plaintiff was awarded Kshs 2,000,000/- in general damages. The Plaintiff is said to have been hospitalized for a period of 5 months and was recorded to have sustained the following injuries Right mid-shaft femur fracture, comminuted compound tibia/fibula fracture, right thigh ecchymosis and tenderness, right leg 10cm cut wound, septic bone loss and tenderness of right hip. A medical report produced in court indicted that the Plaintiff had immobilized right lower limb at 50% and that she required future medical treatment at the value of Ksh. 84,000.
8. As regards to special damages, the Appellant is seeking Kshs. 331,992 on the ground that the trial court allowed an amendment of the plaint to include an addition of the figure as special damages on 15/1/2019.
9. The Respondent has opposed this appeal through written submissions and supports the decision made by the trial court.
10. The Respondent submits that the trial court's assessment of general damages at Kshs 500,000/- was proper and commensurate to the injuries sustained by the Appellant. The Respondent relies on the following decision;



- a. *Eston Mwirigi Ndege & Anor vs Joseph Macharia Kawira* (2019) eKLR where the Plaintiff sustained fracture of the right femur, right arm, right forearm and was admitted in hospital for 3 months. He was also assessed to have suffered 15% incapacity. The court substituted an award of Kshs 650,000/- as general damages with that of Kshs 500,000/-
 - b. Paul N. Njoroge vs Abdul Sabuni Sabonyo (2015) eKLR where injuries sustained were recorded as multiple comminute fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 cm. Displaced fracture of the left shoulder blade, swelling and stiffened knee. The Court of Appeal reassessed and enhanced the general damages awarded from Kshs 200,000/- to Kshs 500,000/-.
 - c. *Jitan Nagra vs Abednego Nyandusi Oigo*[2018]eKLR where the court set aside an award of Kshs 1,000,000/- for general damages with that of Kshs 450,000/- for the following injuries, lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.
11. This Court has considered this appeal and the response made. This appeal is basically about quantum and being a first appeal this court is bound to re-evaluate or reassess the evidence tendered and arrive at own conclusion. Assessment of damages is a matter of discretion by a trial Court and the general rule is that an appellate court would rarely interfere unless it is shown that the assessment was either too low or excessively too high as to represent wrong/erroneous estimate.
 12. That principle was well illustrated in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal held as follows:-

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”
 13. The trial court awarded the Appellant Kshs. 500,000/- as general damages for the injuries sustained. Injuries sustained are not disputed. They are contained in the Plaint dated 20th February 2017 and in the medial report dated 22nd November 2017 prepared by Dr P.N Mutuku. They are listed as follows;
 - a. Unconscious on first admission
 - b. Wound right lateral part of both legs lower part
 - c. Fracture of right femur
 - d. Fracture of left femur
 - e. Medical fibular fracture of the left leg.
 14. The doctor assessed the Appellant’s degree of injury as maim and further opined that as follows; Though the fractures have healed, the patient developed slight deformities and walks with difficulties. He will suffer osteo-arthritic pains in both lower limbs for a long time and will require strong pain killers.



15. The Appellant also relied on a further medical report dated 5th April 2016 and prepared by Dr. Michael Maru of P.C.E.A Kikuyu Hospital who opined as follows;

...he was treated at Mwingi Hospital then transferred to P.C.E.A Kikuyu Hospital on 12/1/2016. X-Rays revealed fracture of both femur. He underwent ex-fix right femur on 10/2/2016. He developed thrombocytopenia and urine retention. He was referred to PCEA Kikuyu hospital for physician and surgical review. He is still awaiting to have fixation of left femur.

16. The trial court found that the decisions relied upon by the appellant were not comparable in terms of severity of the injuries sustained. The court found that the injuries sustained by the Plaintiffs in the cases cited by the Appellant were more serious which is indeed correct. In the case of *Gabriel Mwashuma vs Mohammed Sajjad & Anor* (2015) eKLR for instance, the Plaintiff underwent multiple operations and sustained more severe injuries where he received treatment in Kenya and abroad in Germany. Similarly, in the cases of *Alex Wachira Njagua vs Gathuthi Tea Factory & Anor* (2010) eKLR and *Lucy Waruguru Gatundu vs Miriam Nyambura Mwangi* (2017) eKLR the injuries sustained by the Plaintiffs therein were more severe (refer to paragraph 9 above).

17. I have looked at the medical report by Dr. Michael Maru of PCEA Kikuyu Hospital and there is no indication as to how the thrombocytopenia and urine retention was affecting the appellant and besides that the same was not pleaded in the plaint. The trial court cannot be faulted in not considering what is not pleaded. A party is bound by his/her pleadings.

18. The general method of approach in assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

19. Ngugi J in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR stated as follows;

On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages.

20. This Court has considered the decision it deems comparable. They are:-

- a. *Amritlal S. Shah Wholesalers Ltd & Another V Joshua Ekeno* [2012] eKLR where the plaintiff sustained compound fractures of the tibia and fibula, the appellate court upheld an award of Kshs. 350,000/- in 2012
- b. *Kenyatta University v Isaac Karumbe Nyuthe* [2014] eKLR where the court substituted an award of Kshs. 700,000/= to Kshs. 350,000/= for injuries of fracture of the right femur, soft tissue injuries to the head and bruises on the right knee and temporary loss of consciousness in 2014



- c. In *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR the court held that an award of Kshs. 700,000/= as general damages was sufficient for injuries of fracture of the right mid-shaft femur, fracture of the right mid-shaft femur, fracture of the left mid-shaft femur, devolving wound on the right tibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead.
 - d. In *Sammy Mugo Kinyanjui & another v Kairo Thuo* [2017] eKLR, the plaintiff suffered fractures of the tibia and fibula bones of both legs. On appeal, the High Court set aside the trial court's award of Kshs 1,000,000/- and substituted it with a sum Kshs 600,000/- in 2017
 - e. *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR the appellate court upheld an award of Kshs. 800,000 in 2018 where the plaintiff had suffered femur fractures and fractures of the tibia fibula. There were additional injuries in this case of femur fractures.
21. This Court finds that flowing from the above authorities it is not correct to term the award made by the trial court as inordinately low. The award made of Kshs. 500,000 in light of injuries suffered is comparable with the awards given in the cases I have referred to above.
22. On special damages, the appellant has faulted the trial court for not considering the special damages of Kshs. 331,992 which he claims was introduced through an amendment.
23. I have perused through the proceedings of the 15th January, 2019. There was no amendments applied for or allowed.
- The proceedings of 15.01.2019 indicates that the matter was filed for hearing on 14.02.2019.
24. The application for substitution was made on February 14, 2019 and the same was allowed by the trial court. (See page 43 of the record of appeal). There was no application for amendment of the plaint and there is also no amended plaint on record.
25. It is trite that special damages must be specifically pleaded and proved to be sustained. Order 2 rule 4 of the *Civil Procedure Rule* clearly illustrates that a plaintiff must specifically plead the same.
- In *Hahn versus Sing* [1985] eKLR 716, the Court held as follows: -
- 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. In the plaint dated February 20, 2017, special damages pleaded were of Kshs 5,550/- as follows;
- i. Motor vehicle search Kshs 550.00
 - ii. Medical Report Kshs 5,000.00
 - iii. Medical and related -
expenses continuing
and details to be supplied
at the hearing
Total 5,550.00



27. The trial court found that only the receipt for the medical report was inadmissible for not having a revenue stamp as provided for under section 19(1) of the *Stamp Duty Act*. The court proceeded to awarded special damages at Kshs 5,000/-.
28. The appellant has raised a legitimate issue which relates to the special claim of Kshs. 550 which the trial court declined on grounds that there was no revenue stamp. The position taken by the trial court was erroneous. Section 19(3) of *Stamp Duty Act* provides as follows: -

Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions

- a. if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector
- b. in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21
- c. in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.”

29. In *Paul N. Njoroge versus Abdul Sabuni Sabonyo* [2015] eKLR the court held as follows: -

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 ...”

30. Based on the decision by the Court of Appeal, the trial court erred for rejecting the receipt produced for payment of the motor vehicle search on the basis that the Appellant had not complied with the [Stamp Duty Act](#) as it had not given him an opportunity to pay the requisite stamp duty and penalty prescribed under the Act.

In sum, this appeal for the aforesaid reasons fails. I am not persuaded that there is basis to interfere with the discretion of the Lower Court save that, the appellant is awarded Kshs. 550 special damages which amount was paid in respect to inspection done at the Registrar of motor vehicle. The Respondent shall have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

