



**Idris & another v Lime & another (Suing as the legal representatives  
in the Estate of Samson Ndunde Lime (Deceased)) (Civil Appeal  
E20 of 2022) [2023] KEHC 18062 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18062 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E20 OF 2022  
JRA WANANDA, J  
MAY 26, 2023**

**BETWEEN**

**MOHAMMED IDRIS ..... 1<sup>ST</sup> APPELLANT**

**INIRIETA NALISI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DORKA AJWANG LIME ..... 1<sup>ST</sup> RESPONDENT**

**VIOLET SHIVOGO ANDESIO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES IN THE ESTATE OF SAMSON  
NDUNDE LIME (DECEASED)**

**JUDGMENT**

1. This Appeal arises from the Judgment delivered on February 24, 2022 in Kakamega Chief Magistrate's Court Case No. 15 of 2021. In the Judgment, the Respondents were awarded damages against the Appellants as compensation for the death of 43-year-old male, one Samson Ndunde Lime, which arose as a result of a road accident. The appeal is only on the award of special damages.
2. The background of the matter is that by the Complaint filed on February 9, 2021 through Messrs Geoffrey O. Okoth & Co. Advocates, the respondents alleged that the 1<sup>st</sup> Appellant was the driver/rider of the motor tricycle Registration No. KTWB 827Y which was owned by the 2<sup>nd</sup> appellant, that on December 6, 2019 the deceased was lawfully riding his motor cycle registration number KMEL 676J along the Kakamega-Mumias road when at Ikonyero area, the 1<sup>st</sup> appellant negligently drove/rode his said motor tricycle registration number KTWB 827Y causing it to knock the left side of another motor cycle, registration number KTWB 665F, causing it to overturn on the road and thereby obstructing the deceased and as a result whereof the deceased rammed into the overturned motor tricycle registration number KTWB 665F, consequently, the deceased sustained fatal injuries to which he succumbed.



3. The appellants, through Messrs Akwala & Co. Advocates filed their statement of defence on March 10, 2021. They denied the allegations in the Plaint and in the alternative, blamed the owner of the motor tricycle registration number KTWB 665F for causing the accident.
4. By the consent recorded in Court on December 2, 2021, the parties agreed to apportion liability at 80:20 in favour of the Respondents. By the same consent, they also agreed on net awards to the Respondent for Kshs 1,202,179.20 for “loss of dependency” and Kshs 80,000/- for “loss of expectation of life” (both after being subjected to the 20% contribution). Costs of the suit were also awarded to the Respondents.
5. On the remaining two prayers for “pain and suffering” and for “special damages”, the parties filed Submissions for determination by the court. By consent, they adopted their filed list and/or bundles of documents and witness statements in evidence.
6. Upon considering the respective Submissions, the trial court awarded to the respondent a sum of Kshs 2,064,847/- in “special damages” and Kshs 150,000/- for “pain and suffering”.
7. A summary of the aggregate amount awarded by the court after the same was subsequently rectified after the judgment was as follows:

Liability in favour of Respondents	80:20
Pain & Suffering	Kshs 150,000.00
Special damages	Kshs 2,064,847.00
Sub-total	Kshs 2,214,847.00
Less 20% contributory negligence	Kshs 442,969.40
Sub-total	Kshs 1,771,877.60
Agreed loss of dependency	Kshs 1,202,179.20
Agreed loss of expectation of life	Kshs 80,000.00
Grand total	Kshs 3,054,056.80

8. Aggrieved with the award on “special damages”, the appellants preferred this appeal, based on the following grounds:
  - i. The learned trial magistrate erred in law and or fact in awarding special damages of Kshs 2,064,847/= yet the same had not been specifically pleaded and strictly proved in accordance with the law.
  - ii. The learned trial magistrate erred in law and or fact in granting an award of Kshs.1,724,347/= on the basis of an invoice and in the absence of receipts to prove payment of the said sum yet invoices are not proof of payment and the said award was erroneous, unlawful and contrary to the law.



- iii. The learned trial magistrate erred in allowing and or considering receipts and or documents which were inadmissible and untenable in respect of special damages which lead him into error and the award on special damages ran a foul of the law and or was wrong, unlawful, irregular, indefensible and has occasioned a serious miscarriage of justice.

### **Hearing of Appeal**

9. This appeal was then canvassed by way of written submissions. The appellants filed their submissions on October 11, 2022 whereas the respondents filed theirs on December 13, 2022.

### **Appellants' Submissions**

10. Counsel for the appellants submitted that it is trite law that special damages must not only be specifically pleaded but must also be strictly proved. He further submitted that in the plaint, the respondents pleaded special damages of Kshs.2,423,587/=, it was then upon them to produce admissible receipts, not invoices, in support of the alleged claim, they failed to do so, they produced an invoice for Kshs 1,724,347/= but did not produce receipts or any proof of payment for the same, the Court accepted, admitted and allowed the said invoice and made an award inclusive of the same in breach of the law. Counsel cited the decisions in Total Kenya Ltd vs. Janevams Ltd [2015] eKLR and Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku [2006] eKLR in which, according to Counsel, the Courts held that an invoice is not proof of payment and that only a receipt meets the test. He maintained that it is not enough for a party to provide an invoice, one is required to produce an actual receipt as proof of payment.
11. Counsel further contended that the receipts produced by the Plaintiffs in support of other claims of special damages did not bear revenue stamps which is a mandatory requirement under the *Stamp Duty Act*, the same were inadmissible and ought to have been totally disregarded, they were erroneously admitted and considered. He urged the Court to hold that the award on special damages was erroneous, unlawful and indefensible.

### **Respondents' Submissions**

12. On his part, counsel for the respondents submitted that on January 13, 2022, the trial court pursuant to a suggestion by the appellants' counsel, gave directions that they were to rely on the filed documents, that is receipts and invoice as exhibits. Counsel further submitted that the Appellants' Counsel did not object to the production of any of the receipts and invoice from various facilities amounting to Kshs 2,423,587/= filed as part of the Respondents pleadings and that the same were produced as; exhibit PEXT 3a being a receipt from Kakamega County General Hospital, exhibit PEXT 4a being an Invoice from St. Luke Orthopaedic and Trauma Hospital, exhibits PEXTS 4b-4z being receipts from St. Luke Orthopaedic and Trauma Hospital, exhibits PEXTS 5a-c being receipts from Moi Teaching and Referral Hospital, exhibits PEXTS6e-f being receipts for mortuary and funeral expenses and exhibit PEXT 13 being the receipt for obtaining the grant of letters of administration ad litem.
13. Counsel further submitted that the aforementioned receipts emanated from medical expenses that the deceased's dependants incurred when the deceased was receiving treatment at St. Luke's Orthopaedic and Trauma Hospital, Moi Teaching and Referral Hospital Eldoret and receipts for mortuary and funeral expenses.
14. Regarding the limits of an appellate Court's power to disturb an award by the subordinate court, Counsel cited the decisions in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR and Shabani v City Council of Nairobi [1895] KLR, 516.



15. He further submitted that the Respondents pleaded a sum of Kshs 2,423,587/= and were awarded Kshs 2,064,847/= which award was proved by receipts, some of the receipts were towards the payment of the sum in the invoice of Kshs 1,971,047/=. He cited the decisions in *Hahn v Singh Civil Appeal No.42 of 1983 [1985] KLR 716*, *Wycliffe Momanyi v Daniel Absolom Otwoma & Another [2022]* and *Capital Fish Limited V Kenya Power & Lighting Company Limited [2016]*.
16. Counsel argued that the allegations by the appellants that the respondents did not produce receipts or any proof of payment as per the invoice are untrue, the respondents produced exhibits in form of receipts and the invoice which the appellants did not object to during trial, special damages were strictly proved as evidenced by the receipts.
17. On the allegation that the receipts produced did not bear revenue stamps, Counsel submitted that the receipts bore revenue stamps save for two receipts for mortuary charges from Kakamega County Referral Hospital for the sum of Kshs 5,900/=: the two receipts emanate from a public hospital and thus the Respondents cannot be punished for the omissions of the receiver of the monies thereof. He cited the decisions in *Swalleh C. Kariuki & Another v Violet Owiso Okuyu [2021] eKLR*, *Joseph Kimani & Another v James Kangara Kahanya [2017]* and *Benedetta Wanjiku Kimani v Chanaw Cheboi & Another [2008]* and submitted that the award of Kshs 2,064,847/= as special damages was reasonable in the circumstances.

### **Analysis & Determination**

18. This being a first appeal, this court is obligated to re-evaluate and re-appraise the evidence to arrive at its own independent conclusion on whether or not to uphold the decision of the trial court. Further, the Court has jurisdiction to delve into matters of fact and law in determining the appeal. (see *Selle v Associated Motor Boat Company Ltd [1968] EA 123*).

### **Issues for determination**

19. After careful analysis, I find that the only issue that arises for determination in this appeal is “whether the respondents proved special damages”.
20. The principles upon which an appellate court can interfere with a trial Court’s award of damages were set out in *Kemfro Africa Ltd T/a “Meru Express Services 1976” & Gathogo Kanini –vs- A.M Lubia & Olive Lubia (1982-1988) IKAR 727* where Kneller J A 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 the judge in assessing the damage 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”.

21. The appellants argue that the trial court erred in awarding to the respondents’ special damages of Kshs 2,064,847/=: that in the Plaint, the respondents pleaded special damages of Kshs 2,423,587/= and thus it was upon them to produce receipts, not invoices, to support the claim, they produced an invoice for Kshs 1,724,347/= but did not produce any receipts or proof of payment of the invoice. The appellant also faulted the trial court for admitting receipts that did not have revenue stamps.



22. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. In *Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa*, the Court stated as follows:

“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

23. In *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011))*, Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated as follows:

“I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff .... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

24. From the record, I observe that the respondents produced several receipts and invoices from various hospitals as proof of the medical expenses incurred. The appellants faulted the trial Magistrate for admitting receipts that did not bear revenue stamps. It has been submitted by the appellants that the said receipts should not have been admitted in evidence for lack of stamp duty.

25. First, I note that the receipts were all produced and admitted in evidence by what amounted to a consent. In fact, it is the appellant’s counsel who moved the court to adopt such directions. Even if were not by consent, still the appellants never raised any objection at that point. The first time that the appellants brought out the issue was in their final submissions. I therefore find it mischievous for the appellant to have waited to raise such objection at the tail end of the matter. This cannot be proper practice.

26. I agree that under the *Stamp Duty Act*, Cap 48 Laws of Kenya, for an “instrument” to be produced in evidence, it is supposed bear a revenue stamp for it to be admissible except in criminal proceedings and in civil proceedings by a collector to recover stamp duty. Section 19(1)(a) & (b) of the *Stamp Duty Act* provides that;

19. Non-admissibility of unstamped instruments in evidence; and penalty

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except —

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.”



27. It is however also correct to state that section 88 of the same Act places the duty to affix a revenue stamp on a receipt upon the giver, not the payee. To decline admission of such receipts would be therefore to punish an innocent party. On this point, I fully associate myself with the following statement made by Munyao Sila J, in *Jackson Kariuki Kahungura & another v John Karanja Kihagi & 5 others* [2018] eKLR:

‘69. On the second contest, that the receipts are not stamped, I was referred to the provisions of Section 19 (1) .....

.....

70. What in this case is said to have needed a stamp are the receipts produced by the plaintiff. I have gone through the receipts and I do observe that some receipts were stamped but some are not. The receipts for repair of the gate wall (where the plaintiff claimed Kshs. 3,104,644.88/=) are stamped. They are two receipts of Kshs. 1,552,323/= each, so there can be no contest over this claim. But what about the receipts that have not been stamped? I have carefully gone through the *Stamp Duty Act*, and some decided cases on this point. It is true that the *Stamp Duty Act*, does require that receipts be stamped. The provision is not in Section 19 but in Section 88 which is drawn as follows:

88.

(1) Any person receiving any money of one hundred shillings or upwards in amount, or any bill of exchange or promissory note for an amount of one hundred shillings or upwards, or receiving in satisfaction or part satisfaction of a debt any movable property of one hundred shillings or upwards in value, shall, on demand by the person paying or delivering the money, bill, note or property, give a duly stamped receipt for it.

.....

.....

71. From the above, the duty to stamp the receipt is not that of the recipient but that of the issuer of the receipt. One could object to production of the receipt if not stamped, so that it may be stamped, but once introduced as evidence, the court cannot close its eyes and assume that no such expense was ever incurred. This indeed appears to be the approach taken by several judges. In the case of *Beatrice Ndungwa Makau vs Nairobi City Council & Another*, High Court at Nairobi, Civil Appeal No. 1 of 2007, (2012) eKLR, the trial magistrate court refused to make an award of special damages on the reason that the receipts produced were not stamped. On appeal, Onyancha J, stated as follows:

“In rejecting the evidence contained in the receipts produced by the appellant, the trial magistrate used the ground that the receipts were not revenue-stamped. However, that reason was one for rejecting the receipts from being produced. However, neither the Respondents nor the court objected to production. Once the evidence was properly produced in my view, it would be difficult for the court to close its eyes and brain to the evidence they contained or represented. In my opinion, the court should not have ignored properly admitted evidence of the appellant, which were in any case, not rejected by the respondents.”

72. The learned Judge proceeded to make the award on special damages based on these unstamped receipts.



Emukule J, in the case of *Benedeta Wanjiku Kimani (Suing as the administrator of the Estate of Samwel Njenga Ngunjiri (deceased) vs Changwon Cheboi & Another*, High Court at Nakuru, Civil Suit No. 373 of 2008 (2013) eKLR also faced a situation where a claim for special damages was made and the receipts produced did not have revenue stamps. The judge was of the following view:

18.03 I have indeed looked at the invoices, and receipts, and they indeed do not appear to bear any copy of a revenue stamp affixed to them. That does not however conclusively determine that the Plaintiff did not pay for the various services rendered in the course of the deceased's hospitalisation, or for his funeral expenses.

18.05 In my view it is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed on them. Lastly having admitted the receipts by consent, the Defendant's counsel is estopped from challenging their admission by way of submission.

18.05 In the result therefore, I allow plaintiff's claim in the sum of Ksh 75,650/= as special damages."

73. What transpired above is what we have in this case. There was no objection to the production of the receipts, and I am in agreement, as averred by Emukule J above, that the defence is now estopped from challenging them at this stage.

74. In my humble view, courts need to be slow before denying someone an award for money that he must have spent, just because a receipt, for which the duty to stamp is not his, has not been stamped. Why should the court prejudice you for the omission of somebody else and on something that you have no duty to do? If say, you broke your leg following an accident, and there is ample and undisputed evidence that you spent so many nights in a hospital, and you underwent surgery, and you spent Kshs. 500,000/= for which the hospital has issued you with a receipt but has not stamped it, surely should you be denied this money, of which there is no doubt that you have spent, just because the hospital has not stamped the receipt? We have to look at the justice of the case and not technicalities. Maybe the most I can do, if there is an objection at the time of production, is to ask you to ensure that the receipt will be stamped.

75. ....  
.....

76. Thus, the objection that this court cannot make an award based on the contention that some receipts were not stamped, must fail. My conclusion on this point is that the plaintiff has proved damages in the sum of Kshs. 8,037,309.88/="

28. From the above therefore, I reiterate that the duty to stamp a receipt is not that of the recipient but of the issuer of the receipt. The respondents cannot therefore be victimised for the absence of the revenue stamps on the receipts that they were issued with.

29. In any case, I have carefully gone through the receipts that were produced by the Respondents and find that the only unstamped receipts that I can identify are only two. These are receipts for mortuary charges issued from the Kakamega County Referral Hospital aggregating the sum of Kshs 5,900/=. In



view of the foregoing, I find no reason to disturb the trial court's award on the ground of absence of revenue stamps on the receipts. This ground of the Appeal therefore fails.

30. On the second ground, the appellant's counsel submitted that in the Plaintiff, the Respondents pleaded special damages at the sum of Kshs 2,423,587/=, that it was then upon them to produce receipts in support of the claim, that however, regarding a sum of Kshs 1,724,347/- thereof, they only produced an invoice. counsel submitted that the court then awarded a total sum of Kshs 2,064,847/- inclusive of the said amount of Kshs 1,724,347/- yet no Receipt was produced for it.
31. It is true that the trial court found that an expense of the sum of Kshs 1,724,347/= stated in the invoice from St. Luke's Orthopaedic and Trauma Hospital had been proved. It is however not in dispute that indeed no receipt was produced to support this alleged expenditure. It is also a well settled principle of law that an invoice is not proof of payment and that special damages can only be proved by producing actual receipts or invoices endorsed with the word "Paid" (see Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR.
32. Regarding the said sum of Kshs 1,724,347/= claimed as medical expenses, the respondents did not produce any receipts in support thereof. What they produced and solely relied upon was an invoice. The respondent's Counsel argues that the award was properly made because the appellant's did not at the trial court, object to the production of the invoice. The respondent's Counsel has missed the point here. The appellants never challenged the admissibility of the invoice, what they challenged was the argument that an invoice alone, without any further proof that payment was in fact made, can support an award of special damages.
33. I also note from the judgment that although the appellant's counsel raised the said challenge, the trial magistrate did not mention or refer to it at all in his Judgment. Evidently therefore, the magistrate did not direct his mind on the issue nor did he interrogate or analyze it.
34. In the circumstances, I find that the learned trial magistrate erred in including the said sum of Kshs 1,724,347/= as part of the aggregate special damages awarded at Kshs 2,064,847. What was produced in support of that amount was only an invoice with no receipt or any other acceptable evidence to prove actual payment. The amount of Kshs 1,724,347/- is therefore deducted from the aggregate amount of Kshs 2,064,847/- awarded as special damages.

### **Final Orders**

35. In the end this appeal partially succeeds. The final order is therefore in the following terms:
  - i. The trial court's award of special damages at the sum of Kshs 2,064,847/- is hereby reduced by deducting thereof the sum of Kshs 1,724,347/-.
  - ii. Consequently, the trial court's award of special damages at Kshs 2,064,847/- is hereby set aside and substituted with an award of Kshs 1,392,700/-.
  - iii. Since only the award of special damages was appealed against, the rest of the Judgment of the trial court remains undisturbed.
  - iv. Since the appeal has partially succeeded, each party shall bear its own costs of this appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26<sup>TH</sup> DAY OF MAY 2023**

.....

**WANANDA J. R. ANURO**



**JUDGE**

