



REPUBLIC OF KENYA



**Mwikali v Matheka (Civil Appeal 124 of 2022)
[2023] KEHC 17887 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 124 OF 2022**

MW MUIGAI, J

MAY 25, 2023

BETWEEN

REGINA MWIKALI APPELLANT

AND

JAMES MUTUKU MATHEKA RESPONDENT

*(Being an appeal from the judgment and decree of the Hon W. Njuguna
(RM) delivered on 4.08.2022 in KANGUNDO SPMCC NO. E65 OF 2021)*

JUDGMENT

Trial Court Record

Plaint

1. Vide a Complaint filed on 20.04.2021, it was averred that the cause of action arose on 16.11.2020 at around 1.00 pm. The Plaintiff was lawfully travelling in Motor vehicle registration number KCC xxxT along Kangundo road when at Kamulu near National Oil Libya Petrol station, the motor vehicle negligently managed, controlled and driven by the Defendant's driver/ servant/ agent collided into motor vehicle Registration number KBN xxxQ while attempting to overtake it and veered off the road hitting an electric pole head on. As a result, the plaintiff sustained serious bodily injuries being displaced fracture mid shaft left femur and soft tissue injuries to the left lower limb.
2. Further, that he underwent surgery where the fracture was fixed with a metal plate and will require Kshs 200,000 for removal of the metal implant at a later date once she has made adequate recovery. She also averred that prior to the accident, she was a healthy young lady working at Pepinos restaurant in Nairobi earning a monthly salary of Kshs 14,000 but as a direct result of the accident, she lost her job and her capacity to earn in future was diminished by 15%.



3. The following orders were sought from the trial court;
 - a. General damages for pain and suffering
 - b. Damages for diminished earning capacity
 - c. Loss of earnings
 - d. Future medical expenses
 - e. Special damages
 - f. Costs of the suit
 - g. Interest

Defence

4. The Defendant's filed a defence on 27.05.2021 denied the contents of the Plaintiff's own negligence as well as the driver of motor vehicle KBN xxxQ. Further, that if the accident occurred, the same was beyond the control of the Defendant. The court was urged to dismiss the claim.

Hearing

5. At the hearing, the Plaintiff was the only witness. She stated that she was not working currently. She was involved in an accident and adopted the statement filed on 20.4.21 as well as the list of documents dated 29.3.21.
6. Upon cross examination, she stated that the accident occurred on 16.11.21, she got injured on her left leg and was admitted at Kathiani level 4 for one month. She was unconscious when the accident occurred and has not healed. She was working at Peponi Restaurant. She wanted to be compensated as she no longer worked and did not have any document to prove that she was working there.
7. The Defendant did not call any witness.

Trial Court Judgment

8. On liability, the Trial court found that the evidence of the Plaintiff remained uncontroverted and found the Defendant 100% liable for the accident. While making reference to the medical report by Dr. Titus Ndeti, the submissions of parties, the Trial Court cited the case of *Reamic Investment Limited v Joaz Ameyya Samuel* [2021], the court awarded Kshs 300,000 as general damages.
9. To the extent that the Plaintiff did not produce any evidence of employment, the court noted that the Plaintiff sought damages for diminished capacity and loss of earnings which are different. It was noted that the latter is normally awarded for real assessable loss which must be proved by evidence while the former is basically diminution in earning capacity. The court relied on the case of *Buttler v Buttler* that was cited in the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR and awarded Kshs 100,000 as damages for diminished earning capacity.
10. On future medical expenses, the Trial court referred to the medical report by Dr. Ndeti that stated that it would cost about Kshs 2000 to remove the implants and Kshs 300,000 at a high cost hospital. It also referred to a report by Medical report by Dr. Ichamwenge Ruth that estimated the cost at Kshs 40,000. In the end, an award of Kshs 100,000 was given.



11. As regards special damages, the court found that Kshs 13,950 had been pleaded and proven, it was noted that the receipts had no revenue stamps which is a requirement under section 19(1) of the Stamp duty Act and a receipt ought not be received in evidence if duty on it had not been paid.
12. In conclusion, the court awarded as follows;
 - a. Liability in favor of the Plaintiff against the Defendant at 100%
 - b. General damages for pain and suffering Kshs 300,000
 - c. Damages for diminished earning capacity Kshs 100,000
 - d. Future Medical Expenses Kshs 100,000
 - e. Special Damages Kshs 13,950
Total Kshs 513,950
 - f. Costs
 - g. Interest from the date of judgment

The Appeal

13. Dissatisfied by this judgment, the appellant who was the Plaintiff in the Trial court filed a memorandum of Appeal dated 23.08.2022 seeking the following orders;
 - i. The judgment of the trial court on quantum be set aside
 - ii. The amount of general damages, special damages and future medical expenses payable to the Appellant be assessed afresh by this Honourable Court.
 - iii. The costs of the Appeal together with accrued interest be awarded to the Appellant.
14. The same is founded on the grounds that;
 - a. The learned Trial Magistrate erred in law and in fact in awarding the appellant Kshs 300,000 as general damages which award was inordinately low in view of the injuries sustained by the appellant and the current inflation rate.
 - b. The learned Trial Magistrate erred in law and in fact by declining to award the Appellant the pleaded and proved special damages of Kshs 63,770 by considering irrelevant factors and leaving out relevant ones.
 - c. The learned Trial Magistrate erred in law and in fact by disregarding the appellant's submissions on quantum and authorities cited by the appellant and entirely relying on the Respondent's submissions thereby awarding the appellant general and special damages that were inordinately low.
 - d. The learned Trial Magistrate erred in law and in fact by awarding the appellant Kshs 100,000 as future medical expenses thereby disregarding the expert opinion of Dr. Titus Nzeti.
 - e. The learned Trial Magistrate's judgment was arrived at in a cursory and perfunctory manner without properly analyzing evidence presenting in the suit on quantum and the entire award of general damages, special damages and future medical expenses to the Appellant is inordinately low.



15. The Appeal was canvassed by way of written submissions.

Submissions

16. The Appellant filed submissions on 2.2.2023 and indicated that she took issue with quantum. It was submitted that the award of Ksh 300,000 for general damages, pain and suffering was inordinately low for the injuries of displaced fracture mid shaft left femur and soft tissue injuries to the left lower limb. The Appellant contends that in the case of *Reamic Investments Limited v Joaz Amenya Samuel* (2021) eKLR that the Trial court relied on in its judgment, the plaintiff had made submissions relying on authorities which did not have comparable injuries to the ones sustained while the Defendant made submissions citing case laws which had comparable injuries to the ones sustained by the Plaintiff hence the High court agreed with the Defendant's submissions and awarded the Plaintiff Kshs 350,000 as general damages.
17. It was submitted that in this case, the Respondent cited irrelevant and old caselaw which did not have comparable injuries to the ones sustained and the Trial court ignored caselaw submitted by both parties. The court was urged to consider the case of *Akbar Mohammed Haji Ali v Jacton Ouma Okello* [2018], *Jackline Kamunyi Kamau v Simon Kiiru Njoki* [2018] eKLR and *Kiautha v Ntarangwi* (Civil Appeal E050 of 2021) [2022].
18. As regards future medical expenses, it was submitted that the Appellant's femur was fixed with a metal implant. The report by Dr. Titus Ndeti indicated that the Plaintiff requires Kshs 200,000 to remove metal implants in a low cost hospital and Kshs 300,000 in a high costs hospital. This evidence was not controverted as the Respondent only attached a medical report to its submissions but the same was not produced in evidence and is not recorded in the proceedings, it was submitted. The Court was urged to review the award of future medical expenses to Kshs 300,000 taking judicial notice of the high rate of inflation and the high costs of living.
19. As regards special damages, it was submitted that the Appellant pleaded for Kshs 63,770 and produced receipts in the list of documents dated 29.03.2021. The Appellant opined that the Trial court ignored some receipts on account that they did not bear revenue stamps and the Respondent did not object to the production of those receipts at the time of production. The Appellant contended that he actually incurred those expenses. The court was urged to review this award and find that the same was proven.
20. The Respondent filed submissions on 2.2.2023 and stated that the award of damages was adequate. It was submitted that the assessment of damages is a discretionary exercise which must be done judicially with wise circumspect and upon some legal principles. The Appellant will be disturbed if the trial court considered an irrelevant factor, left out of account a relevant or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
21. Secondly, that the award must consider court awards for damages considering similar injuries and awards. Reliance was place on the case of *Michael Okello v Priscilla Atieno* [2021] eKLR, *Godfrey Wamalwa Wamba & Another v Kyalo Wambua*.
22. To buttress the point that the award of Kshs 300,000 was sufficient, further reliance was placed on the cases of *Harun Muyoma Boge v Dr. Daniel Otieno Agulo*, Migori HCCA NO 86 of 2012 where an award of Kshs 150,000 was substituted with an award of Kshs 300,000 for multiple injuries and fracture of right tibia and fibula, *Naom Momanyi v G4S Security Services Kenya Limited* [2018] eKLR where an award of Kshs 300,000 was given for a fracture of the left –right condylar tibia, blunt injuries on the back and multiple bruises on the left arm, *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR



where an award of Kshs 400,000 was upheld on appeal for a fourth rib and compound fracture of the left tibia/fibula and the case of *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR.

23. As regards future medical expenses & diminished earning capacity, it was submitted that the award of Kshs 100,000 was more than adequate in the circumstances as the Respondent's medical doctor had proposed Kshs 40,000 in the medical report dated 01.11.2021.
24. On diminished earning capacity, the Respondent submitted that there was no evidence adduced by the Plaintiff and should have been disregarded by the Trial Court. However, the award of Kshs 100,000 was adequate.
25. It was submitted that on special damages, the award should not be disturbed. Reliance was placed on the case of *Leonard Nyongesa v Derrick Ngula Righa* Civil Appeal no 168 of 2008 (Mombasa) on the requirement of payment of stamp duty under the *Stamp Duty Act*.
26. On costs, the Respondent relied on Section 27 of the *Civil Procedure Act* and stated that costs follow the event. The Respondent urged the court to dismiss the Appeal and they be awarded the costs of the Appeal.

Determination

27. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.
28. This is a 1st appellate court and as aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123 this court should evaluate and/or assess the evidence on record as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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...”

29. From the Memorandum of Appeal, the Appellant only takes issue with quantum. Liability is not contested. The Appellant contends that the awards for quantum were inordinately low in the circumstances and prays for review of the same. The quantum was awarded under different headings which the court shall look at singly. The court also notes that the Appellant did not challenge the award for diminished earning capacity.
30. As regards general damages, the injuries sustained pleaded by the Appellant in the Plaint dated 29.03.2021 are displaced fracture mid- shaft left femur and soft tissue injuries on the left lower limb. This is corroborated by the medical report dated 9.3.2021 by Dr. Titus Ndeti Nzinsa that was produced as part of the bundle of documents. The opinion and prognosis of the doctor is that;

“Regina suffered grievous harm. She sustained soft tissue and skeletal injuries which caused her untold pain, blood loss and suffering. The injuries have interfered with her routine duties and for a period of one year from the time of accident she won't be able to attend her duties as before the accident. She will require removal of the implants in a low cost hospital is about two hundred thousand shillings (200,000) and in a high cost hospital is about three hundred thousand shillings (300,000) all inclusive. The degree of functional permanent incapacity is assessed at fifteen percent (15%).”



31. The evidence of the Appellant remained uncontroverted. In *Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya* [2020] eKLR where the Court held that:-

“It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter*, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-

In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of *John Wainaina Kagwe..v.Hussein Dairy Ltd*[2013]eKLR, the Court of Appeal held as follows:-

The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no fresh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident.”

32. As regards interference with an award of general damages, The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”



33. Similarly in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia* (1985) 1KAR 727. At page 730 Kneller JA said: -

“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.”

34. This Court considered the pleadings and documentary evidence produced depicting the Appellants injuries that arose from the traffic accident. Paragraph 5 of the Complaint filed on 20/4/2021, P3 Form of 11/2/2021 and the Discharge Summary from Kathiani Sub County Hospital of 1/2/2021 and Dr. Titus Ndeti Nzina Medical Report of 9/3/2022 all confirm the Appellant’s injuries sustained during the road traffic accident were/are;

Displaced fracture mid shaft left femur & Soft Tissue Injuries to the Left Lower Limb.

35. The Plaintiff submitted on cases to inform the Trial Court on quantum as follows;
36. *Akbar Mohamed Haji Ali v Jackton Ouma Okello* [2018] eKLR The Plaintiff therein sustained fracture of the femur, thigh bone, bruises on the head and upper lip and blunt injuries to the upper abdomen, left leg and left thigh and was awarded Kshs. 800,000/-
37. In *Jackline Kamunyi Kamau v Simon Kiiru Njoki* [2018] eKLR where the Respondent sustained a fracture of the right femur which was fixed with a K-nail and had permanent disability of 15% and was awarded Kshs. 1,290,000/- The Appellant took the view that these authorities were not considered by the Trial Court in assessment of quantum.
38. This Court has considered the cases cited in the Trial Court and the evidence that was placed before the Trial Court and finds that unlike the Appellant herein sustained injuries but were not multiple as in the 1st case referred to and did not sustain 15% permanent disability as indicated in the 2nd case, these are more serious and permanent disability unlike the Appellant’s case herein. The Trial Court considered the authorities but were of more grave situations than the instant case. Therefore, this Court finds no reason to interfere with the award on quantum by the Trial Court.
39. In the case relied upon of *Reamic Investment Limited v Joaz Ameyia Samuel* [2021] eKLR, the Respondent had sustained similar injuries with the Appellant herein.
40. Secondly, on the issue of future medical expenses, the medical report by Dr. Ndeti indicates that the cost will be between Kshs 200,000 and Kshs 300,000. The Trial Court relied on a Medical report by a Dr. Ichamwenge Ruth but no document nor evidence was produced by the Respondent with regard to the said Medical Report and as such this document could not be relied upon to arrive at a reasonable conclusion. The Medical Report by Dr Ndeti was not challenged and the Medical Expert gave alternative figures depending on which hospital the Appellant visited for the Trial Court to consider. This Court substitutes the award of Kshs 100,000 with that of Kshs 200,000 under this head for future expenses.
41. Thirdly, on special damages, I agree with both parties that they must be strictly pleaded and proven. In this case the issue is that there was no revenue stamp on certain receipts as a result of which the court did not award the same. The Trial Court relied on Section 19(1) of the *Stamp Duty Act*, cap 480 Laws of Kenya which provides as follows;



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
42. This issue was also addressed in the case of *Wycliffe Lubanga Kefa v Dennis Ochola & another* [2020] eKLR where Musyoka J observed as follows;

On the matter of stamp duty, specifically on the question of admissibility of receipts, where the revenue or duty stamp has not been affixed, the courts have addressed the same severally. In *Joseph Kimani & another v James Kangera Kahanya* [2017] eKLR, the court stated:

“The matter of unstamped payment receipts has been put to rest in numerous court decisions.

Under the *Stamp Duty Act*, Cap 48 Laws of Kenya it is a mandatory requirement that any receipts produced in evidence must have a revenue stamp for them to be admissible except in criminal proceedings by a collector to recover stamp duty, unless it is duly stamped.

- Sections 19(1) (a) (b) of the Act.

See HCCA No. 71 of 2015 *Eunice Auma Onyango v Salin Akinyi Oluoch* [2015] eKLR & *Leonard Nyongesa v Derrick Ngula Right – Civil Appeal No. 168 of 2008 at Mombasa* (unreported)

It is also trite that a receipt ought to be stamped by the Receiver of the payment, and not the giver or the payee.

Section 88 of the Act places that duty upon the receiver, not the payee to affix revenue stamps on the receipt.”

12. In *Maxam Limited v Heineken East Africa Import Company Limited & another* [2019] eKLR, the court said:

“46. For the court to consider the effect of failure to have the document in question stamp duty stamped as required under section 19(1) of the *Stamp Duty Act*, has to consider the purpose of having a document stamped. The section provides that:-

“No instrument chargeable with stamp duty shall be received as evidence in any proceedings whatsoever except ...”

My understanding of the section is to ensure any document for which stamp duty is required to be paid for, should have stamp duty paid first before it can be received. Failure to pay stamp duty does not in my mind mean that the document is invalid or fatally defective but stamp duty that is required to be paid had not been paid; first before admission of the document as there is no bar in paying the stamp duty due thereafter or upon an order of the court to that effect.”

.....

14. The only matter for me to consider is whether the trial court was justified to hold that the said receipts were not admissible as evidence in view of the provisions of section 19(1) of the *Stamp Duty Act*, Cap 480, Laws of Kenya. That provision is about receiving the documents in evidence where stamp duty was not paid. The courts have consistently said that where a party



seeks to rely on unstamped receipts, the trial court should give time to that party to correct the anomaly. See *Bagabat Ram v Rattan Chand* (2) [1930] AIR Lah 854, *Sunderji Nanji Limited v Mohamedali Kassam Bhaloo* [1958] EA 762 and *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali v Chengo Kabindi Birya & another* [2018] eKLR . Should the stamp duty be paid thereafter, the court ought to receive the document as evidence, but in default it should decline to admit the document.

15. In Mumias SPMCC No. 1113 of 2006, the trial court, when confronted with the receipts sought to be produced before stamp duty was paid, did not inform the appellant that he ought to pay the stamp duty nor give him time to pay, as suggested in *Bagabat Ram v Rattan Chand* (supra), *Sunderji Nanji Limited v Mohamedali Kassam Bhaloo* (supra) & *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali v Chengo Kabindi Birya & another* (supra). Instead, the trial court received and admitted the documents in evidence, despite the lack of revenue or stamp duty stamps, and marked the same as exhibits, numbers 2 to 7. The question then is whether, having received the said receipts as evidence and marked them as exhibits, the trial court could later on, in its judgment, say that they were not admissible. The holding in the judgment, that the receipts were not admissible, was a contradiction, for the court had already admitted them in evidence and marked them as exhibits. Having accepted the documents at the oral hearing, the court was not justified in rejecting them at the judgment. It has been suggested in a number of other cases that such evidence could be accepted so long as no one was complaining, and further that, in any event, it should be the issuer of the receipt who ought to affix the stamp and not the buyer.
43. In this case, the Appellants documents were admitted as a bundle by Consent of parties through respective Counsel. The Respondent did not raise any issue of inadmissibility of receipts of medical expenses incurred by the Appellant.
44. The Respondent raised the issue of Stamp Duty requirement in the Written Submissions. Special damages were specifically pleaded and proved as original documents were produced as a bundle. The Respondent did not inform the Appellant that she ought to pay the stamp duty nor give her time to pay, as suggested in *Bagabat Ram v Rattan Chand* (supra), *Sunderji Nanji Limited v Mohamedali Kassam Bhaloo* (supra) and *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali v Chengo Kabindi Birya & another* (supra).
45. From the above, this Court finds that the receipts ought not have been rejected on the ground of lack of Stamp Duty as parties agreed on production of documents as a bundle. This court finds that special damages of Kshs 58,038 is what was pleaded and proven from the list of documents dated 29.3.21 which was produced.

Disposition

46. In the end, the Court upholds award on liability and finds on appeal as follows;
 - a. Liability in favors of the Plaintiff against the Defendant at 100%
 - b. General damages for pain and suffering Kshs 300,000/-
 - c. Damages for diminished earning capacity Kshs 100,000/-
 - d. Future Medical Expenses Kshs 200,000/-
 - e. Special Damages Kshs 58,038/-Total Kshs 658,038/-



f. Costs

g. Interest from the date of judgment

47. Since the Appeal is partly successful, there shall be no orders as to costs. Each party shall bear own Costs.

48. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/5/2023
(VIRTUALLY/PHYSICALLY)**

M.W. MUIGAI

JUDGE

In the presence of:

Ms Mulubi -for the Appellant

Ms Waweru - for the Respondent

Geoffrey/patrick - Court Assistant(s)

Ms Waweru for the Respondent: We pray for 30 days stay of execution.

Court: Stay of execution granted for 30 days.

M.W. MUIGAI

JUDGE

