



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wasufiani & 2 others v Ali & another (Civil Appeal 178 of 2015)  
[2023] KEHC 27580 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 178 OF 2015  
F WANGARI, J  
NOVEMBER 24, 2023**

**BETWEEN**

**HAMISI JUMA WASUFIANI ..... 1<sup>ST</sup> APPELLANT  
JACQUILINE TABU WAFULA ..... 2<sup>ND</sup> APPELLANT  
BAHATI KYALO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**RAZIYA HASHAM ALI ..... 1<sup>ST</sup> RESPONDENT  
MUSTAFA H MOHAMED ALI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. H. Nyakweba, Principal Magistrate dated 1/12/2015 arising from Mombasa CMCC No. 1218 of 2004.
2. The Memorandum of Appeal substantially raises the following Grounds:
  - a. The Trial Court erred in misapprehending the import of the consent judgement.
  - b. The Trial Court misapprehended the evidence the evidence of the parties.
  - c. The Trial Court failed to appreciate the tenure of the pleadings filed by the Appellant.
  - d. The Trial Court erred in dismissing the Plaintiff's suit.
  - e. The Trial Court erred in allowing half cost to the Appellant.
3. The Plaintiff's further Amended Plaintiff dated 7<sup>th</sup> June 2007 claimed damages arising from an accident that occurred on 28<sup>th</sup> October 2003. The accident involved the 1<sup>st</sup> Plaintiff, now deceased and the Defendant's Motor Vehicle Registration No. KAH 790Y. It was pleaded that the 1<sup>st</sup> Plaintiff was a pedestrian at the time of the accident.



4. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Ksh. 2,100/= as Special Damages and pleaded General Damages. The Respondents entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff.
5. The Trial Court heard the parties and proceeded to render judgement on 1<sup>st</sup> December 2015. In the Judgement, the Court dismissed the Plaintiff's case and awarded half cost to the Plaintiff.
6. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

### **The Appellants' case**

7. The 1<sup>st</sup> Plaintiff passed away about 7 months after the accident. The Plaintiff amended the Plaintiff to include the aspect of the demise of the Plaintiff. I have noted however that the amendments did not bring out the cause of death of the deceased as the accident herein. Nothing was pleaded to change the cause of action from one of grave personal injuries to fatal injuries.
8. In this regard, the Plaintiff's witness testified on Court on 10<sup>th</sup> February 2014. It was her case that the deceased was her father and that he used to buy food and pay fees for his children. Further, the Police Officer testified and produced the police abstract in Court.
9. The Defendant closed their case without calling any witness.

### **The Appellants' Submissions**

10. The Appellants submitted that the Deceased had suffered a fracture to the right tibia and bruises to the right elbow. It was the submission that in the circumstances, the Deceased was entitled to compensation of Kshs. 850,000/-. However, the cases they relied on were old and were not comparable to the injuries suffered by the Deceased.
11. I have not had sight of the Respondent's submissions despite directions that both parties file and exchange submissions.

### **Analysis**

12. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
13. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:  
-  
“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
14. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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..."

15. This Appeal is on quantum only. The issue is whether the Learned Trial Magistrate erred in dismissing the suit. The Appellant submitted that the Trial Court misapprehended evidence and ended up to an erroneous verdict.
16. I have noted that the Learned Magistrate made a finding that the Plaintiff did not prove evidence of the injuries pleaded. The reason the court gave was that the Plaintiff's witness who produced the Medical Report in court was not the maker. However, the court acknowledged that a Medical Report by Dr. Obwana was produced in evidence. I have read the proceedings and confirm that the Plaintiff's witness indeed produced the Medical Report.
17. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
18. Furthermore, in light with the Motor Vehicle Assessor's Report produced in evidence in this court, it is trite law that it guides the court but is necessarily binding. In *Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29*, it was held that:

"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995*. There the Court said with regard to the evidence of experts: -

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: - "Because this is the evidence of an expert, I believe it."...

19. I will first deal with the issue of special damages. Special damages are very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved.
20. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

"In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it



must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore, in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages have become crystallized and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

21. Therefore, in my reevaluation of the evidence, I have established that indeed the Plaintiff failed to prove the special damages as pleaded. No receipt was filed or produced in court to support the pleaded Medical Report expenses of Kshs. 2000 and the Police Abstract expenses of Kshs. 100. I have no reason to disturb the finding of the Trial Court under this head. In *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal 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.

22. On General Damages, this was not a fatal claim. The court was guided by the pleadings filed in Court. The injuries involved fracture of the right tibia and bruises to the elbow. The court noted that the Plaintiff had not proved injuries.
23. I differ with this finding. The Court acknowledged and I have confirmed that the Plaintiff produced a Medical Report in Court. This was Exhibit 6. The Court's finding that the Medical Report produced was not an exhibit because it was not produced by the maker was made without basis. It amounted to



a contraction. I say so because there is no record of objection to the production of this document. It consequently formed a record of the court and the Plaintiff's evidence upon production.

24. The Court of Appeal in the case of *Kenneth Nyaga Mwigie vs Austin Kiguta and 2 others* [2015] eKLR had this to say on production of documents.

... Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.

The Court of Appeal further stated: -

Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

25. Further, in the case of *Des Raj Sharma Vs Reginan* [1953] EACA 210, the court held that there is a distinction between exhibits and articles marked for identification and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence.
26. Therefore, the finding by the trial court that the Medical Report was not an exhibit even though it was produced as such amounted to a reversible error of fact.
27. In this case, there is no dispute that the 1<sup>st</sup> Plaintiff, now deceased suffered a fracture of the right tibia and bruises to the right elbow. This court will proceed to reevaluate the evidence and authorities in support of the award of damages.
28. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
29. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -



- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - 2) The award should be commensurable with the injuries sustained.
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - 5) The awards should not be inordinately low or high.
30. Therefore, consideration is drawn to the following similar fact cases. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.
  31. In Justine Daniel Owino & Another v Elizabeth Atieno [2020] eKLR, the Plaintiff suffered fracture of the tibia and fibula, deep cut on the right leg and soft tissue injuries. The trial court awarded Ksh 600,000/=, but on appeal the same was reduced to Ksh 400,000/=.
  32. In Sammy Mugo Kinyanjui & Another vs Kairo Thuo (2017) eKLR, Kshs. 600,000/= was awarded for the Plaintiff who had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula.
  33. The most comparable judicial authority in my view is Justine Daniel Owino & Another v Elizabeth Atieno [2020] eKLR, wherein the Plaintiff suffered fracture of the tibia and fibula, deep cut on the right leg and soft tissue injuries. The trial court awarded Kshs 600,000/=, but on appeal the same was reduced to Kshs 400,000/= in 2020. In the circumstances of this case and bearing in mind inflation, I will award General Damages of Kshs. 700,000/= as payable for the injuries in this case.
  34. Liability was recorded at the ratio of 70:30 in favour of the Plaintiff. It stands.
  35. Costs are in the discretion of the court and follow the event. In the circumstances of the success of the Appeal, I set aside the award of half costs by the Trial Court. I ward the Appellant full costs in the Trial Court.

### **Determination**

36. In the upshot, I make the following orders: -
  - a. Judgement of the Lower Court is set aside and substituted with an Award in General Damages of Kshs. 700,000/- to the Plaintiffs and jointly and severally against the Defendants.
  - b. The Appellant shall have costs in the Lower Court and this Appeal.
 It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

.....

**F. WANGARI**

**JUDGE**



**In the presence of: -**

Achoka Advocate h/b for Maundu Advocate for the Appellant

N/A by the Respondent

Barile, Court Assistant

