



**Akishar Logistics Limited v Mwaura (Civil Appeal 168 of 2021)
[2023] KEHC 26750 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 168 OF 2021
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

AKISHAR LOGISTICS LIMITED APPELLANT

AND

DENNIS NJOROGE MWAURA RESPONDENT

JUDGMENT

1. The appeal herein arises from the decision and judgement of Hon D. Milimu delivered on 26.11.2021 in Eldoret CMCC No. 1061 OF 2018. The Appellant was the Defendant in the Civil Suit CMCC No. 1061 OF 2018 and the Respondent was the Plaintiff. The respondent had instituted a suit against the defendant vide an amended plaint alleging that on or about 9.7.2018 the Respondent was lawfully travelling as a passenger aboard motor vehicle Reg No. KCB 170 P along Eldoret-Webuye road. The Appellant's driver so negligently drove, managed and/or controlled the motor vehicle Reg No. KCD 05IT-ZC 2221 causing it to collide with motor vehicle Reg No. KCB 170P thereby occasioning severe bodily injuries to the Respondent.
2. The Appellant entered appearance vide a memorandum of appearance filed on 3.12.2018 and subsequently filed a statement of defence on 18.12.2018 denying all allegations made by the Plaintiff and putting him to strict proof. The matter was then set down for hearing. the trial magistrate rendered its judgement in the matter on 26.11.2021 as follows: -

Liability: 80% : 20 % in favour of the Respondent as against the Appellant

- a. General damages - Kshs. 4,500,000/=
- b. Special damages - Kshs. 424,400/=
- c. Total - Kshs. 4,924,400/=
- d. Less 20% - Kshs.984,880/=



- e. Total award - Kshs. 3.924.400/=
 - f. Costs of the suit
 - g. Interests thereon
3. Being aggrieved with the judgement and decree of the trial court, the appellant instituted the present suit vide an amended memorandum of appeal dated 21st July 2023 premised on the following grounds;
1. That the learned magistrate erred in law and fact In awarding the Respondent a sum of Kshs. 4,500,000/= for general damages an amount which Is so excessive in the circumstance as to amount to an erroneous estimate of the loss suffered.
 2. That the learned trial magistrate erred in law and fact In awarding the Respondent a sum of Kshs. 424,400/= for special damages that were not proved to the required standard.
 3. That the learned trial magistrate erred in law and fact in over relying on the evidence of the Respondent which was not corroborated.
 4. That the learned trial magistrate erred in law and fact in disregarding the relevant evidence on record hence arriving at a wrong decision.
 5. That the learned magistrate erred I n law and fact in falling to consider the Appellant’s submission and legal authorities relied upon in support to the Defence thereof.
 6. That the learned trial magistrate court erred In law and fact by over-relying on the Respondents submissions and legal authorities which erred not relevant and without addressing her mind to the circumstances of the case.
 7. That the learned magistrate erred in law and fact by falling to appreciate that the permanent disability percentage decreases with time as per the 2nd medical report dated 7.1.2019 produced In court as an exhibit.
 8. That the learned trial magistrate erred in law and fact by falling to considered conventional awards for general damages in case of similar Injuries and awarded general damages for pain and suffering that the learned trial magistrate decision albeit, a discretionary one was plainly wrong.
4. The parties prosecuted the appeal by way of written submissions.

Appellant’s case

5. The appellant was represented by the firm of Messrs Omwenga & Co. Advocates. Counsel filed submissions dated 16th September 2023. The appellant urged that the learned trial magistrate erred in law and fact by awarding the Respondent general damages for pain and suffering of Kshs. 4,500,000/= which was too high in the circumstances amounting to and erroneous award that is oppressive on the part of the Appellant.
6. The Plaintiff in the amended Plaintiff pleaded the following particulars of injuries;
 - a. Severe head injury with sub-arachnoid and subdural haematoma
 - b. Bruises on the forehead
 - c. Bruises on both upper limbs
 - d. Fracture right femur



- e. Open right tibia/fibula fracture
 - f. Degloving injury to the right foot
 - g. Bruises and lacerations on the left lower limb
7. Counsel submitted that it is trite law that in awarding damages for personal injury, all the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour to secure some uniformity in the method of approach. He relied on the case of [Apex Security Services Limited v Joel Atuti Nyaruri](#) [2018] eKLR in support of this submission.
8. The Appellant's case is that the Respondent failed to corroborate the evidence on record on the injuries sustained and therefore the Respondent failed to prove his case on a balance of probabilities and as such this claim should be dismissed for want of proof. The trial court only relied on the documents produced in Court and never called the makers of the said documents before the Court to testify on the contents of the documents, therefore the same constitutes to hearsay evidence and could not be relied upon by the trial court in making its decision. They relied on the case of [Alex Kyalo Ngima & 2 others v Kisau Girls Secondary School \(Sued through the chairman board of governors Kisau Girls Secondary School\)](#) [2021] eKLR in support of this submission. Further, that it is a fatal omission for the Respondent's case not to produce x-ray film(s) to guide the Court on the alleged fractures sustained. We hereby submit that the Respondent failed to prove the existence of the alleged fractures as pleaded. The trial court relied on legal authority that were not relevant to this instant case in awarding the general damages hence arriving at the erroneous decision. Indeed, the trial court relied in the case of [Charlene Njeri Kuria v Gitu Geoffrey & Another](#) [2016] eKLR in awarding the general damages. The injuries therein were more severe than in this case, and included Injury to the spine with transient alteration in the level of consciousness, due to the spine injury, fracture dislocation at the level of L1 to L2 (complete anterolisthesis of L1 over L2 and wedge fracture of L2) with cord injury. Loss of sensation on the lower limbs distally. Lower abdominal (lap belt) bruising. Lower back deformity. The trial court further relied on the case of Emmanuel Kombe also known as [Kombe Emmanuel v Basari Company Limited & Another](#) [2017] eKLR where the Appellant had sustained spinal injuries due to cord compression at site T5 and T6 resulting in paralysis of the lower limbs, intestinal paralysis and loss of bladder control. He also had a fracture of the back bone T5 and T6, dislocation of the chest center bone, a cut on the head and loss of consciousness. From the above cases relied upon by the trial court, it is clear that the injuries therein were far more severe than the injuries sustained by the Respondent herein. The appellant maintained that the Court misguided itself in relying on the above cases in making its decision in total disregard that the injuries in the said cases were not in any way commensurable to this instant case.
9. The appellant urged this court to interfere with the award by the trial Court and make an award of general damages to Kshs. 1,500,000/= which is commensurate award to the injuries sustained by the Respondent. Counsel cited the case of [Swalleh C Kariuki & Another v Violet Owiso Okuyu](#) [2021] eKLR where the Appellant sustained displaced fracture of the right ulna and radius, displaced fracture of the right femur, tear of the patella tendon of the left knee and soft tissue injuries.
10. In this case, the trial magistrate did not consider the fact that comparable injuries should be compensated by similar awards of general damages. The two cases referred to by the trial court addressed situations involving multiple injuries including severe fractures whereas in the present case, the Respondent sustained injuries which were less severe. The appellant urged the court to allow this appeal on quantum, set aside the award of Kshs. 3,500,000/= general damages awarded to the Plaintiff/ Respondent by the trial court and substitute it with an award of Kshs. 1,500,000/=."



11. On quantum, the appellant submitted that the respondent in the amended Plaint pleaded the following particulars of special damages as follows; -
- a) Medical report - Kshs. 6,000/=
 - b) Treatment expenses - Kshs. 446,839/=
 - c) Travel expenses - Kshs. 132, 000/=
- Total - Kshs. 584,839/=
12. The trial court awarded Kshs. 424,400/= which was not proved to the required standard. It is trite law that special damages are specifically pleaded and strictly proved. During the hearing, the respondent produced the following; receipts for taxi services totalling to Kshs. 132,000/=, receipts for physiotherapy services totalling to Kshs. 209,000/=, invoice of Kshs. 171,162/= dated 23.8.2018 from Moi Teaching and Referral Hospital and receipts thereto totalling to Kshs. 72,900/=, receipt by Dr Joseph Sokobe dated 24.8.2021 of Kshs, 6,000/=, receipt from Jassin Pharmaceuticals of Kshs. 3,400/=, receipt from Eldoret Pharmacy Limited of Kshs. 265/=, receipt of Greenline Bus Company of Kshs. 800/=. It is trite law that a receipt for which one wishes to claim special damages must not only be specifically pleaded and strictly proved, but it must also comply with the provisions on Section 19(1) of the *Stamp Duty Act*. Non-compliance with the provisions of this section has always proved fatal to the Plaintiff's claim for special damages as illustrated in the case of *Leonard Nyongesa v. Derrick Ngula Righa*, Civil Appeal No. 168 of 2008 (2013) eKLR. The appellant maintained that the trial court awarded receipts from Moi Teaching and Referral Hospital totalling to Kshs. 72,900/= receipt from Jassin Pharmaceuticals of Kshs. 3,400/=, receipt from Eldoret Pharmacy Limited of Kshs. 265/= and receipt of Greenline Bus Company of Kshs. 800/= yet the same are not awardable as they have not taken for stamp duty assessment. Kshs. 424,400/= for special damages was not strictly proved and is therefore the court be pleased to hold the same as not awardable.
13. It is the Appellant's submission that the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support to the defence thereof. It is undeniable that the court did not address its mind on the evidence and submissions made by the Appellant herein thereby arriving at a wrong decision. As such, the appellant urged this court to exercise its powers to correct the errors pointed out in the trial court's decision to avoid the miscarriage of justice. The appellant urged the court to allow the appeal as prayed.

Respondent's Submissions

14. Learned counsel for the respondent submitted that from the Medical documents tendered the Respondent sustained the following injuries;
- (a) Severe head injury with sub-arachnoid and subdural haematoma.
 - (b) Bruises on the forehead.
 - (c) Bruises on both upper limbs.
 - (d) Fracture right femur.
 - (e) Open right tibia/fibula fracture.
 - (f) Degloving injury to the right foot.
 - (g) Bruises and lacerations on the left lower limb.



15. The subordinate court made an award of Kshs 4,500,000 (Four Million, Five Hundred Thousand as General damages, Special Damages of Kshs 424,400 plus costs of the suit and interest. The award of Kshs. 4,500,000 less 20% liability leaving Kshs. 3,600,000 as general damages after liability was reasonable and commensurate to the injuries sustained by the Respondent. The Plaintiff sustained a severe head injury, complete spinal cord transection of the level of T7 and T8, dislocation both knees and dislocation of both shoulders. General damages were assessed at Kshs 8,000,000. From Dr J. C Sokobe's Medical Report at page 14 - 15 of the Record of Appeal the permanent disability for the injuries was assessed at 80 % which is an indicator that the injuries sustained by the Plaintiff were quite serious and the Plaintiff is bed ridden and not able to engage in many gainful employment. The award was not inordinately high so as to warrant the interference of the award by the appellate court.
16. On Special damages, counsel urged that the sum of Kshs. 424,400 was proved by way of receipts and the same are specifically pleaded. In spite of having pleaded for special damages of Kshs 584,839 the Court scrutinised the receipts and made an award of Kshs 424,400 only. The respondent urged the court to uphold this amount awarded by the court.

Analysis & Determination

17. This being an appellate court, I must first state the duty of the court as was laid out in [*PIL Kenya Limited v Oppong*](#) [2009] KLR 442, where the court held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.
18. Similarly, in [*Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) [2013] eKLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
19. The appeal before this court is mainly on quantum of damages. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of [*Butt v Khan*](#) {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is 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 either inordinately high or low”.
20. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in [*Mkubee v Nyamuro*](#) [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.



21. Upon considering the memorandum of appeal and the submissions of the parties, the only issue for determination is;

Whether the trial court erred in its award of damages

22. It is not in dispute that the respondent sustained the following injuries;

- (a) Severe head injury with sub-arachnoid and subdural haematoma.
- (b) Bruises on the forehead.
- (c) Bruises on both upper limbs.
- (d) Fracture right femur.
- (e) Open right tibia/fibula fracture.
- (f) Degloving injury to the right foot.
- (g) Bruises and lacerations on the left lower limb

23. He sustained permanent disability of 80%

24. It is trite law that when awarding damages, courts should consider comparable awards for comparable injuries in similar cases. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that

“comparable injuries should attract comparable awards.”

25. In *Shabani v City Council of Nairobi* (1985) KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:

There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.

26. In *Abdi Werdi Abdullahi v James Royo Mungatia & another* [2019] eKLR the court awarded general damages for pain and suffering Kshs. 3,500,000/- (Three Million Five Hundred Thousand) where the plaintiff sustained) Multiple fractures on the right lower and upper limb, Amputation of the right lower limb, Multiple fractures and bruises on the upper right limb leading to affixation of two metal plates, Injury to the right eye leading to impaired vision, Compressed burst L4 vertebra with retro pulsed fracture fragments, Deep bruising on the chest due to dragging on tarmac, and Head trauma injuries leading to concussion.

27. In *Bernard Mutisya Wambua v Swaleh Hashi* (2017) eKLR the court awarded damages of Kshs. 6,500,000/- for 80% paralysis of his right limb and other injuries which rendered him incapable of working.

28. I am also guided by the decision of the Court of Appeal in *Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd* [2013] eKLR

“Monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and



have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.”

29. Similarly, Lord Morris of Borthy-Gest stated in *West (H) & Son Ltd v Shepherd* [1964] A.C. 326 pg. 345:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

30. The court is not bound by the decisions of other courts in awarding damages, the same are to operate as a guide in determining the award. The trial court considered the injuries sustained and the pain and suffering that the respondent underwent in awarding the damages. I find that the trial court did not proceed on the wrong principles and as such, there is no reason to interfere with the award of general damages.

Special Damages

31. It is trite law that special damages must be specifically pleaded and proved. The court stated, when awarding the special damages, that the respondent produced receipts for the following;

- a. A receipt for the medical report by Dr Sokobe Kshs. 6,000
- b. Treatment at MTRH Kshs. 77,900
- c. Physiotherapy services Kshs. 208,500/-
- d. Taxi Services Kshs. 132,000/-

32. I am alive to the decision in Leonard *Nyongesa –v- Derrick Ngula Righa* Civil Appeal No. 168 of 2008 (Mombasa) where Justice Kasango held as follows:

“The position therefore, is that a receipt for which payment of stamp duty is required under the *Stamp Duty Act* is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award damages based on such a receipt.”

33. However, the position has since changed and found to be erroneous. The Court of Appeal in *Paul N.Njoroge v. 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 v. 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. -v- Bhaloo* (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in *Bagahat Ram -v- 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 ...

34. In the premises, I am in agreement with the finding of the trial court with regards to its award of special damages. The respondent proved the special damages to the required standard.
35. In the premises, I dismiss the appeal in its entirety with costs to the respondent.
36. 30 days stay granted.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023

In the Presence of

Mururi for Mwinamo

.....

R. NYAKUNDI

JUDGE

