



REPUBLIC OF KENYA



**Onyango & another v Muriu (Civil Appeal 151 of 2017)
[2022] KEHC 232 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 151 OF 2017**

MW MUIGAI, J

MARCH 24, 2022

BETWEEN

FREDRICK ONYANGO 1ST APPELLANT

JAMES MWILARIA 2ND APPELLANT

AND

SERAH WAMBUI MURIU RESPONDENT

*(Being an appeal from the judgment of the Honourable Magistrate
at Machakos Law Courts Mr. Shikanda dated 19th October, 2017)*

JUDGMENT

Plaint Dated 25/04/2012

1. By an Amended Complaint dated 16th August, 2013 before the Trial Court at Machakos in CMCC No.388 of 2017 the Respondent suing as the Plaintiff sought general damages for pain, suffering and loss of amenities, special damages of Kshs.463,700/- plus the costs of the suit and interest against the Appellants.
2. The Respondent pleaded that she was lawfully travelling as a passenger in the Appellant's motor vehicle registration number KBE 929G along Kwa-Makaa area in Yatta Matuu. According to the Respondent, the Respondent's driver, servant and/or agent so negligently and carelessly drove, managed and/or controlled the said motor vehicle causing it to hit a pothole and the front tyre deflated causing the motor vehicle to lose control and roll several times off the road into a ditch. The Respondent blamed the driver of the said motor vehicle.
3. The Respondent pleaded particulars of injuries. She pleaded that she has undergone treatment to regain hair and rehabilitate her deteriorated dental condition. She pleaded that she is forced to adorn a wig at all times as she may not regain her hair ever.



4. According to the Respondent, he was a healthy and energetic woman teaching as a part-time lecturer at Kenyatta University and undertaking a doctorate programme. She pleaded that the injuries forced her to go for an unpaid leave for a period of ten (10) months as she was forced to stay at home on total bed rest. She pleaded that her PhD studies were interrupted which led to lose of her money that she had paid for the programme. The Respondent pleaded that she would require a sum of Kshs. 100,000/- for further and future medical expense.
5. In their joint defence, the Appellants denied the particulars of injuries, loss and damage as itemized in the Plaint. According to the Appellants, the Respondent is not entitled to the claimed damages and the doctrine of *res ipsa loquitor* is inapplicable.

Evidence

6. PW1, Serah Wambui Muriu stated that she was a PhD student at Kenyatta University and part time lecturer at the same institution. She adopted the contents of her witness statement filed in court on 26th April, 2012 as part of her testimony.
7. PW1 stated that she was injured on the head. She had a swelling. According to PW1, she was taken to Mary Immaculate Health Centre at Kilimambogo. She produced the treatment notes PEX 1. According to PW1, she was given painkillers at the hospital. She vomited. She stated that she was taken to Kenyatta University Hospital through a referral letter from Kenyatta University Health Unit produced as PEX 2 where an MRI was done and surgery was done on her head. She stated that it was said that there was a lot of blood in her brain. According to PW1, she was admitted at the hospital for 5 days where blood transfusion was done. She produced Discharge Summary and other referrals from Kenyatta National Hospital which are 4 in number as PEX 3.
8. PW1 stated that it took her one year to resume to her normal way of life since she could not work for one year. She produced the P3 Form as PEX 4 and police abstract as PEX5. It was her testimony that after the operation her hair could not grow and her private doctor Sarut Singh who tried for two years treat her hair could not manage since no hair can grow on her head. She stated that the doctor prepared a report which she produced as PEX-6. She stated that she wear wigs. She did show the court the bald head.
9. According to PW1, after the accident her face was swollen and survived on pain killers but after she stopped using the same, she started feeling pain on her jaws and gum. She stated that she lost 7 teeth which had cracked. She was attended to by a dentist known as Dr. Ndung'u Mwangi who prepared a report dated 24th February, 2012 which she produced as PEX-7. She also saw Dr. Wokabi who prepared the report dated 14th March, 2012 and produced as PEX 8. She stated that she has never stopped going to the doctors which has caused her to incur a lot of expenses. She stated that she had the receipts for the medical expenses which she produced as PEX 11. According to PW1, she is entitled to her salary for 10 months since she was not working. She stated that she was usually paid per unit taught hence a total of Kshs. 690,000/- for the 10 months. She stated she had a letter dated 27th April, 2017 from the finance department which show the period she was out of work. She produced the letter as PEX 12(a) and a copy of her payslip as PEX 12(b) but were objected to by Mr. Wanjohi, Appellants advocate hence they were marked as PMF1 12(a) and 12(b).
10. PW1 stated that the head injury affected her career since she has not finished her PhD which she started in the year 2009. She stated that she spent most of her time at the hospital three (3) times a week. She stated that she has high blood pressure. She sustained stroke and her right leg toes has a problem. Her right hand thumb is deformed due to the stroke. She stated that she cannot grow hair. According to her, she cannot be able serve her family hence pray for compensation and costs.



11. In cross-examination by Mr. Wanjohi, PW1 stated that the driver was not on a high speed but could not control the motor vehicle. According to PW1, there are four semesters in a year at Kenyatta University. She stated that she taught in all the semesters but she didn't teach the period she was injured. According to PW1, her full time salary was KShs.44, 000/-. She stated that she was still on medication for pressure and her teeth.
12. PW2, Dr. Raphael Wanjiru Kamau Kangethe, stated that she was a lecturer, Head of Early Childhood Department at Kenyatta University and a Deputy Director at Kenyatta University City Campus. According to PW2, in the year 2010, PW1 was working as a part time lecturer at the University. She stated that according to the University Regulations, the letter of appointment was given according to the units taken but a lecturer could get more units. That there was also payment according to the scripts from the students. She referred to the payslip of March, 2010 and stated that the Plaintiff was paid KShs. 2,000 per hour hence the total was KShs. 63,000/-. She stated that there was a travelling allowance of KShs. 2,000/- per month but was not included. She stated that the letter and payslip were issued by the university which she produced as PEX 12(a) and (b) respectively. She stated that she was conversant with the signature of Mr. Wambua, DVC.
13. According to PW2, PW1 did not work for almost 1 ½ years following the accident which was about 7 semesters. She stated that the payment is for the semester and not the month but at times payment is made monthly.
14. In cross-examination by Mr. Wanjohi, PW2 stated that the pay slip is for the semester which comprises of three (3) months. She stated that at times salary is paid monthly but as per the pay slip, the Plaintiff was to be paid at the end of the semester. According to PW2, PW1 resumed in September, 2010. She stated that PW1 was not paid for the semester she did not work. According to PW2, the remuneration for marking depends on the number of students. She stated travelling allowance is claimed separately.
15. In re-examination, PW2 stated that there is a 3 month semester and a semester for one month. According to PW2, PW1 reported back to work in September, 2010.
16. After the close of the Respondent's case, Mr. Wanjohi for the Appellants stated that he had agreed with the Respondent's advocate to produce Dr. Wambugu P.M medical report dated 11th September, 2012 as DEX 1. No witness was called on behalf of the Appellants.

Trial Court's Judgment

17. In his Judgment, the Trial Magistrate held that the Respondent was a mere passenger in the motor vehicle and in the absence of an explanation from the Appellants, the Respondent cannot be said to have failed to establish negligence against them. The 2nd Appellant was held 100% liable while the 1st Appellant being the registered owner was held vicariously liable.
18. On quantum of damages, the Trial Magistrate held that the Respondent had prior to the accident dental problems but was inclined to find that the Respondent's hair loss was a result of the head injuries. Based on three separate decisions from the authorities relied upon by the Appellants and Respondent, he awarded the Respondent general damages of KShs.950, 000/-
19. While awarding special damages of KShs. 390,888/-, the Trial Magistrate stated that he was only awarding the sum of money contained in receipts from Private institutions bearing the revenue stamps and those from Kenyatta National Hospital which is a government institution exempted from stamp duty under Section 117(1) of the Stamp Duty Act. Costs of suit and interest were awarded. He declined to award future medical expenses of KShs.100, 000/- for hair growth medication since it is a permanent disability as it will never grow.



Appeal

20. Aggrieved by the Judgment, the Appellants have appealed citing the following grounds:-
- (1) THAT the Learned Magistrate erred in law and in fact awarding General damages for pain, suffering and loss of amenities of Kshs. 950,000/- which award was excessive and not commensurate to the injuries sustained.
 - (2) THAT the Learned Magistrate erred in law and in fact in awarding special damages of Kshs.390, 888/- which award was not strictly proved.
 - (3) THAT the Learned Magistrate erred in law in not taking into account entirely the submissions of the Appellants.
 - (4) THAT the Learned Magistrate finding and decision on General and special damages of Kshs. 950,000/- and Kshs. 390, 888/- respectively was against the weight of the evidence adduced.
21. The Appellants urged the court to allow their appeal by setting aside and reducing the award of general damages of Kshs. 950,000/- and special damages of Kshs. 390,889/- with costs of the appeal.

Appellants Submissions

22. The Appellants contend that the Trial Magistrate erred in fact and law by failing to follow the principles and rules of precedents in awarding general damages. According to the Appellant Kshs. 950,000/- was excessive, unwarranted and not commensurate to the injuries sustained by the Respondent. It is submitted that as per Dr. Wokabi's medical report dated 14th March, 2012, the Respondent sustained facial and scalp injuries but did not explain on the Respondent's loss and dental deterioration. The Appellants assert that the medical reports and treatment notes confirm that the Respondent's injuries have fully healed. The Appellants have pointed out that according to Dr. Wambugu P.M in his medical report dated 11th September, 2012, the Respondent suffered chronic subdural haematoma. It is submitted that the doctor opined that the Respondent had recovered from the injuries and that the loss of hair, skin and dental lesions are unrelated to the accident.
23. According to the Appellant, the heavily relies on the Medical reports of Dr. Wambugu and Dr.Wokabi which according to the Appellant confirm that the Respondent only suffered facial and scalp injuries. The Appellants assert that the Trial Magistrate failed to consider their submissions and authorities on quantum found at pages 86 to 88 of the record of appeal where the Appellant had placed reliance on the case of Francis Ochieng & Another vs. Alice Kajimba [2015] eKLR where the Respondent had sustained head injuries, sub-conjunctiva haemorrhage and periorbital scymosis. Majanja J. assessed general damages at Kshs. 350,000/-. The Appellants urged the court to scrutinize afresh the evidence before the Trial Court.
24. Regarding the award of special damages at Kshs. 390,888/, it is submitted that the receipts did not have the revenue stamp contrary to Section 19 and 20 of the *Stamp Duty Act* Cap. 480. Reliance was placed on the case of *Leonard Njoroge vs Derick Ngula Rhiga* (2013)eKLR where the court stated that where a receipt is required to be stamped under the Stamp Duty Act but not stamped the court cannot attach any probative value on such receipts hence damages are not awardable based on such receipts.
25. The Appellants submitted that the appeal ought to be upheld and the lower court judgment be reduced accordingly as per the Appellants submissions herein.

Respondent's Submissions



26. On behalf of the Respondent, it is submitted that the Trial Magistrate took into account the principles applied in awarding damages and all other relevant factors. According to the Respondent, the Appellants did not object to the production of the treatment notes, P3Form, hospital transfer letters, discharge summary, medical reports and receipts. It is submitted that the Trial Magistrate placed reliance on the injuries pleaded in the Complaint, treatment notes produced, medical reports by respective doctors and the circumstance surrounding the matter. According to the Respondent, the Trial Magistrate considered the medical opinion evidence and the factual evidence on a balance of probabilities to arrive at his decision.
27. According to the Respondent, the Trial Magistrate consider the authorities relied upon by the Appellants to establish less severe injuries while the authorities relied upon by the Respondent to establish more severe injuries hence proceeded to rely on his independent authorities where injuries were comparable to the injuries sustained by the Respondent.
28. He placed reliance on the case of *Peter Cheptoo Kimute & Another vs. Adan Kampure Jillo*[2020]eKLR where the court assessed general damages at Kshs. 1,000,000/- for Appellant's cuts on the shoulder, loss of consciousness, subdural haematoma, severe head injuries and hypatomic and respiratory embassment with a risk of epilepsy which he had recovered from.
29. Regarding special damages of Kshs. 390,888/-, it is submitted that the Appellants did object to the award without giving particulars of the amount they object to and the receipts that lacked stamp duty. According to the Appellants, such receipts were taken into account. According to the Respondent, the Trial Magistrate awarded pleaded special damages and according to the Stamp Duty Act.
30. It is submitted that the appeal lacks merit and the court should uphold the Trial Court Judgment and dismiss the appeal with costs to the Respondent.

Determination

31. I have considered the submissions filed and the authorities relied upon by respective parties.
32. In this appeal, the Appellants have challenged the Trial Magistrate award of Kshs. 950,000/- as general damages and Kshs. 390,888/- as special damages. Liability is not in contention.
33. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

34. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

Section 112

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.



35. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:-

“Denning J, in *Miller vs. Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

36. The Appellants have urged this court to set aside and reduce the quantum of damages for being excessive and not commensurate to the injuries sustained by the Respondent.
37. Essentially the Appellants are asking this court to interfere with the quantum awarded by the Trial Magistrate.
38. This court is guided by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* where the Learned judges set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

“An appellate court will not disturb an award for general damages unless it is so 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...”

39. In the case of *Southern Engineering Co. Ltd vs. Musungi Mutia [1985] KLR 730*, the court held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case...”

40. Indeed, the Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001* reiterated what it had earlier held in the case of *Kemfro vs. Lubia (1982-88) KLR* that:-

“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...”

General damages for pain, suffering and loss of amenities

41. According to the *Black's Law Dictionary* Free Online Legal Dictionary 2nd Edn.-

“General damages are the damages and injuries that directly result from an action or the failure to take action of the defendant.”



42. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:-

“...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty...”

43. In *Mcgregor on damages* 15th Edition 1988 paragraph 153, it observed as follows:

“pain and suffering is now almost a term of art. In so far as that can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequent upon it.

It thus includes the pain caused by any medical treatment which the plaintiff, might have to undergo. Suffering on the other hand denotes the mental or evidential distress which the plaintiff may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like, it is not however, usual for Judges to distinguish between the two elements?

Whereas loss of amenity is deprivation of the plaintiff of the capacity to do the things which before the accident he was able to enjoy, and due to the injury he is fully or partially prevented from participating in the normal activities of life.”

44. The Appellant is aggrieved by the Trial Magistrate award of general damages at Kshs. 950,000/- while the Respondent is in support of the award. Of importance before this court to re-evaluate whether the award was commensurate to injuries sustained by the Respondent and relevant principles in awarding of damages were applied by the Trial Magistrate.

45. The particulars of injuries pleaded in the Plaint by the Respondent are injuries to the:

- i. scalp and facial
- ii. chronic subdural haematoma left frontal parietal area
- iii. loss of hair on the scalp
- iv. progressive dental deterioration
- v. multiple soft tissue injuries

46. According to the referral letter dated 23rd October, 2012 from Immaculate Heart of Mary Hospital-Kilimambogo, the Respondent sustained injuries on the head and a CT scan was recommended to rule out internal injuries. The P3 Form dated 2nd May, 2009 show that the Respondent had bald patches on the scalp, chronic left frontal parietal subdural haematoma. Although I note as per the P3 Form, the Respondent was examined by the police doctor on 9th December, 2011 and the doctor had received 4 KNH treatment notes. At Kenyatta National Hospital, in the treatment note dated 22nd June, 2009 the diagnosis was chronic subdural haematoma upon being admitted at the hospital on 4th June, 2009 and being discharged on 8th June, 2009. The complaints from the Respondent were headache, confusion and inability to walk. According to the medical report dated 9th June, 2017 investigation from the CT Scan brain revealed chronic subdural haematoma(left side). In the medical report from Kenyatta University Health Unit dated 3rd March,2010 it is indicated that the initial X-ray done revealed head injury while the CT Scan from KNH revealed a blood clot.

47. Based on the treatment notes and medical reports the Respondent only had an injury on the head. Dr. M.W Wokabi in his medical report dated 14th March, 2012 noted that the Respondent had sustained



scalp and facial injuries. The doctor noted that the Respondent had severe headache which lasted for one year but now having been cured the Respondent had no head injury related complaints but a possibility of epilepsy would always remain higher than in normal circumstances. Regarding loss of hair and the dental deterioration, the doctor opined that he was not able to explain the reason but an indirect relationship would not be ruled out considered they occurred concurrently. To the doctor it was probably some of the medications she was taking that caused her hair and dental problems since the hair and teeth originate from the same cell line.

48. Dr. Wambugu in his medical report dated 11th September, 2012 noted that the Respondent had dental prosthesis prior to the accident. On the Respondent's head, he noted that the Respondent had significant hair loss on the scalp associated with hyperpigmentation lesions on the face. Despite the Respondent complaining of loss of hair, the doctor opined that the hair loss, skin and dental lesions are unrelated to the accident. According to the doctor, the Respondent sustained skeletal, neural and soft tissue injuries from which the Respondent had adequately recovered.
49. Regarding the dental problem, the Respondent exhibited the dental report dated 24th February, 2012 and signed by Dr. Jane Murugi although I note in his evidence he stated that it was Dr. Ndung'u Mwangi. According to Dr. Wokabi, a further report was needed from a dentist which would give a more informed and detailed report on future treatment. In the dental report, the doctor noted that the Respondent had failed permanent filling and discoloration of tooth number 21, loose upper removable denture because of fractured clasps of teeth number 15 and 17 and secondary caries on tooth number 11. In his evidence the Respondent stated that he had lost 7 teeth which had cracked. However, I note that in the dental report, it is not indicated whether the dental problems were suffered by the Respondent as a result of the accident or had dental problems before the accident. In the report it was neither indicated that the Respondent had 7 cracked teeth nor did the Respondent state that he had a denture.
50. I find Dr. Wambugu's report has credible information about the prior Respondent's dental problems before the accident since the Respondent, Dr. Wokabi and Dr. Jane Murugi reports failed to give the correct position. In a nutshell the Respondent had dental problems before the accident hence an injury to be discounted from the pleaded injuries.
51. Regarding loss of hair, reliance was placed on the medical report of Dr. Saroop Singh Bansil who saw the Respondent first on 12th August, 2011. According to the doctor, the Respondent underwent a surgical procedure for subdural haematoma which had left permanent scars on the scalp. He stated that the treatment started by him helped the Respondent regain some hair on the scalp. According to the doctor some areas are scarred due to the injury and operation and the areas may 'NOT' regain hair ever. In his last report dated 11th August, 2012, he stated that the hair loss was after the car accident in 2009 due to trauma, physical and psychological. According to the doctor hair growth medication had been started and the Respondent is still on the medication had made tremendous improvement. The doctor opined that the Respondent would keep on taking the treatment for at least for another 6 months which would cost in the future approximately Kshs.100,000/-.
52. In her evidence, the Respondent stated that he sustained stroke, right leg had a problem and her right hand thumb was deformed due to the stroke but I find no report was tendered in court to support the injury.
53. Based on the above reports, I find the injuries pleaded in the Plaintiff resulted from the accident save for the progressive dental deterioration.



54. I agree with the position of the Court of appeal in *Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi* [1997] eKLR, as follows:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd –vs- Shephard* [1964] AC 326 at page 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 endeavor 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.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo vs Camden and Islington Area Heath Authority* [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of *Tayab vs. Kinanu* [1982-88] 1 KAR 90.

Lord Denning Mr said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

55. I note at page 17 of the Trial Court judgment, the Trial Magistrate considered both the Appellants and Respondent’s authorities but found that the authorities relied upon by the Appellants although comparable they established less severe injuries while the authorities from the Respondent established more severe injuries.
56. The authorities were also decided prior to the Trial Court judgment herein hence inflationary trend should be a factor to be considered when awarding the damages. I find the court decision of *Nelson Njibia Kimani vs. Davis Marwa & Another*[2017]eKLR decided in 2017 as the Trial Court judgment herein and independently considered by the Trial Magistrate establish comparable injuries but more severe injuries than the injuries sustained by the Respondent herein. The Plaintiff lower right limb was amputated and a permanent incapacity of 40% had been assessed. The Trial Court had awarded Kshs. 1,500,000/- as general damages. The Respondent has relied on the case *Peter Cheptoo Kimute & Another vs. Adan Kampure Jillo* [2020]eKLR which establish similar injuries but it is a decision



decided in the year 2020, three years later. The decision of *Francis Ochieng & Another vs. Alice Kajimba* [2015] eKLR relied upon by the Appellants was decided 2 years before the Trial Court judgment herein. Taking into consideration the inflationary trends, the amount awarded in the case will increase upwards for such injuries.

57. In this case apart from the doctor's opinion that the hair lost may never grow again, it was the view of two doctors that the head problem had been cured and there a tremendous recovery apart from post-traumatic epilepsy.
58. The Trial Magistrate took into consideration the vagaries of inflation. I find the award of Kshs. 950,000/- to be fair compensation. The Respondent injuries are not contested. The Respondent had been kept out of her studies and teaching job for 10 months without pay. The award is not excessive for such injuries.
59. The award of Kshs. 950,000/- as general damages by the Trial Magistrate is upheld.

Special damages.

60. The Appellants contend that the award of Kshs. 390,888/- as special damages was not strictly proved. Based on the Trial Court judgment, this award comprised of Dr. Wokabi's medical report cost, medical expenses and the part-time 10 months' salary.
61. The Appellants assert that the receipts for the medical expenses did not have revenue stamp as required under Section 19 and 20 of the Stamp Duty Act. In the converse, the Respondent assert that the Appellants did not particularize such receipts or the amount for the Trial Court to take into account when awarding the claim for medical expenses.
62. It is trite that special damages must not only be specifically pleaded but must be strictly proved. See *Tracom Limited & another vs. Hasssan Mohamed Adan* [2009] eKLR.
63. The particulars of special damages had been particularized at paragraph 6 of the Plaintiff. I find the Trial Magistrate correctly awarded Kshs.2, 000/- paid to Dr.Wokabi since it was pleaded and a receipt dated 12th March, 2012 was exhibited in court.
64. Regarding the medical expenses with no amount pleaded, the Trial Magistrate awarded Kshs. 209,128/- based on receipts from private institutions bearing the revenue stamps and those from Kenyatta National Hospital, a government facility which are exempted from stamp duty under Section 117(1) (a) of the Stamp Duty Act. I note that the Appellants have not shown either before this court or the Trial Court which receipts did not adhere Sections 19 and 20 of the Stamp Duty Act despite challenging the award. Section 107 of the Evidence Act dictates that whoever alleges must prove. I will not disturb the Trial Court award.
65. Regarding the claim for part time salary for 10 months by the Respondent, the amount pleaded in the Plaintiff was Kshs. 461,000/- but in her evidence, the Respondent did pray for Kshs.690, 000/- as salary. Based on the Appellants submission, I note that the award of Kshs. 179,760/- as salary for the 10 months has not been challenged by the Appellants. The Appellants have not stated whether the amount was arrived at wrongly or not awardable. Notably, it was the amount that the Appellant came up with before the Trail Court and the Trial Magistrate agreed to award the amount. I find no reason to disturb the award.
66. From the foregoing, I find that the Trial Magistrate did not proceed on wrong principles, or that he misapprehended the evidence in some material respect while arriving at the damages he awarded.

Disposition



67. In the result, this appeal fails and is dismissed with costs to the Respondent.

Judgment accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF MARCH 2022.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

MASIRE MOGUSU - ADVOCATE - FOR THE APPELLANTS

MISS GACHUNGU- FOR THE RESPONDENT

GEOFFREY- COURT ASSISTANT

