



REPUBLIC OF KENYA



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**Moraa v Constance & another (Civil Appeal 15 of 2015 & 8 of 2016
(Consolidated)) [2022] KEHC 16650 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL 15 OF 2015 & 8 OF 2016 (CONSOLIDATED)**

F GIKONYO, J

DECEMBER 20, 2022

BETWEEN

ANNAH MORAA APPELLANT

AND

OKUMU CONSTANCE 1ST RESPONDENT

SAMMY MUTUNGA MAINGI 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. T.A. Sitati
(S.R.M) delivered on 6th November 2015 in Narok CMCC NO. 70 of 2012)*

JUDGMENT

1. The two appeals herein are challenging the judgment delivered on November 6, 2015, in which the trial court made the following awards;
 - i. Special damages- Kshs 5,500/=
 - ii. General damages for pain and suffering – Kshs 400,000/=
 - iii. Loss of earning capacity 50% - Kshs 455,160/=Total – Kshs 860,660/=
- 10% liability (contributory) amounting to Kshs 86,066/=
- Net award Kshs 860,660/=
- Less – 86,066/=
- Kshs 773, 594/=
- iv. Costs awarded to the appellant.



- v. Interest at court rates 12% all payable from the date of filing of the suit till payment of the claim in full.
2. On May 13, 2021, this court directed that Narok HCCA No 15 of 2015 filed by the appellant, and Narok HCCA No 8 of 2016 filed by the respondents be consolidated for purposes of hearing issues in each appeal. Narok HCCA No 15 of 2015 was selected as the pilot file. For purposes of this judgment, the appellant in the pilot file shall be referred to as the appellant whilst the respondent who is the appellant in the other file shall be referred to as the respondent.
 3. The appellant's memorandum of appeal dated December 3, 2015 and filed on December 4, 2015 raises 5 grounds of appeal as follows;
 - i. The learned trial magistrate erred in law and fact in evaluation of the evidence before him and in reaching wrong conclusion.
 - ii. The learned trial magistrate erred in law and fact in not awarding special damages pleaded and proved by the appellant.
 - iii. The learned trial magistrate erred in law and fact by not awarding future medical expenses pleaded and proved by the appellant.
 - iv. The learned trial magistrate and in law and fact in failing to consider inflation in assessing general damages for pain and suffering.
 - v. The learned trial magistrate and in law and fact in failing to consider the permanent incapacity in assessing general damages for loss of earning capacity of the appellant.
 4. The respondents' memorandum of appeal filed on November 17, 2016 raises 2 grounds for appeal as follows;
 - i. That the learned trial magistrate erred and misdirected himself as to the exact nature of the respondent's injuries and therefore erred in law in his assessment of damages awardable to the respondent which was manifestly excessive.
 - ii. That the learned trial magistrate erred in assessing damages and failed to apply the principles applicable in an award of damages and comparable awards made for analogous injuries
 5. As these appeals are on quantum this is important: the appellant in a plaint dated April 19, 2021 pleaded the following injuries;
 - i. distal fracture of the right radius (colles fracture).
 - ii. Cut wound on the right leg.
 - iii. Blood loss, physical and psychological pains.
 6. The appellant also described the residual injuries including pains at the right hand, restriction of movements at the right wrist, swelling and tenderness of the right wrist 8 cm healed scar on the radial end of the right wrist, disuse osteoporosis of the right carpal bones, post-traumatic osteoarthritis of the right wrist joint, unable to use her right hand to work and permanent disability of 50%
 7. On July 21, 2015, the parties recorded a consent on liability in the ratio of 90: 10 in favour of the appellant herein. They also by consent produced; a police abstract dated November 21, 2011, P3 form, discharge summary dated October 23, 2011 Tenwek hospital discharge summary dated December 21, 2011. Both parties filed written submissions on quantum.



8. The two appeals were canvassed by way of written submissions.

Appellant's Submissions.

9. The appellant submitted that the trial court magistrate erred both law and fact on the issue of fracture injury suffered by the appellant and as a consequence arrived at an erroneous conclusion as to whether the quantum damages for pain and suffering were commensurate to the injuries sustained by the appellant. That the treatment notes from the initial treatment hospital Narok District Hospital indicate a fracture of the radius. The firm is confirmed with a fracture symbol of # in the discharge summary marked P Exh 6. Therefore, the trial court misapprehended the evidence contained in the discharge summary dated October 26, 2011.
10. The appellant further submitted that the trial magistrates made the said award of general damages on an entirely erroneous and low estimate of damages to which the appellant was entitled and on an erroneous evaluation and conclusion of the injuries sustained by the appellant. The trial magistrate has not demonstrated how he arrived at the figure of Kshs 400,000/= general damages for pain and suffering.
11. According to the appellant, the trial magistrate erred in law and fact in failing to consider inflation in assessing general damages for pain and suffering and loss of amenities or applying any guiding principles in the said assessment.
12. The appellant proposed that the award be enhanced to Kshs 850,000/= for general damages for pain suffering and loss of amenities.
13. The appellant submitted the learned trial magistrate erred in law and fact in not awarding future medical expenses pleaded and proved by the appellant. That the appellant specifically included future medical expenses at paragraph 7 of the plaint and also the medical report by Dr Theophilus Wangatta estimated the cost at Kshs 100,000/=.
14. The appellant submitted that the trial court misapprehended and erred in law in refusing to award the appellant special damages specifically pleaded and proved. That the trial court refused to award special on account of stamp duty. Under the *Stamp Duty Act*, it is the duty of the receiver of monies to affix revenue stamps and not the payee who cannot be penalized for the omissions of the receiver.
15. The appellant submitted that she has abandoned ground 5 of the memorandum of appeal and is satisfied with the trial court's award under the heading of loss of earning capacity.
16. The appellant submitted that prayed that the appeal be allowed with costs and the decision of the learned magistrate be set aside and this court proceeds to re-evaluate and re-assess the evidence quantum of general damages for pain and suffering, award future medical expenses and special damages as prayed and proved and allow the appeal as submitted.
17. The appellant has relied on the following authorities;
 - i. *Selle v Associated Motor Boat Company Ltd* [1968] EA 123.
 - ii. *Butt v Khan* [1977] KLR CAEA.
 - iii. *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR
 - iv. *Benjamin Muela Kimono v Daniel Kipkirong Tarus & another* [2015] eKLR.
 - v. *Paul Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR.



vi. *Stallion Insurance Company Limited v Ignazzio Messina & Co SPA* [2007] eKLR

18. In respect of HCCA No 8 of 2016, the appellant (the respondent in the said appeal) submitted that the memorandum of appeal herein was filed on November 22, 2016 out of time and without leave of the court. The said appeal should have been filed within 30 days from the date of judgment but was not. Therefore, there is no proper appearance before this court. She prayed that the memorandum of appeal be struck out and dismissed with costs.

Respondent's Submissions.

19. The respondents submitted that the medical report by Dr Theophilus Wangatta was never produced as an exhibit and that the slip rule does not apply in the circumstances of this case.
20. The respondents submitted that the fracture was disputed contrary to the allegation by the appellant.
21. The respondents submitted that factual assertions are an irregular and crafty way of the appellant attempting to lead evidence through the backdoor. Submissions cannot be used to lead evidence. The respondents, therefore, urged this court to disregard the factual disposition that # is a medical symbol for a fracture. The interpretation of medical terms and symbols requires an expert and the appellant or her advocate is not a qualified witness to testify on the matter in question.
22. The respondents submitted that the slip rule does not apply in the circumstances of this case and cannot be applied to the fact that the medical report was produced as the appellant's exhibit 10. From the record of the proceedings taken in court, it is clear that the medical report by Dr Theophilus Wangatta was never produced by consent or otherwise.
23. The respondents submitted that the trial court erred in both law and fact in considering a document not produced as an exhibit and basing its decision on such a document thus erred in its finding as to the nature and extent of the injuries.
24. The respondents submitted that the trial court appropriately dismissed the claim for future medical expenses. No evidence was led to support this claim. The appellant never tendered any evidence to prove that she needed further medical treatment.
25. The respondents submitted that the trial court rightly held that the appellant did not suffer any fracture but only suffered a dislocation.
26. The respondents submitted that the trial court add in law and fact in finding that the appellant suffered 50% permanent incapacity. This assessment of permanent incapacity was erroneous for having been solely based on the opinion of doctor Wangata whose report was not produced as an exhibit.
27. The respondents submitted that the trial court erred in law and fact in awarding general damages of Kshs 400,000/= in 2015 without giving sufficient reason and considering any comparable award. Respondents proposed that an award of Kshs 100,000/= was and is sufficient and reasonable in the circumstances and sync with decided cases.
28. The respondents submitted that the trial court erred in law and fact in awarding damages for loss of future earnings. First, the trial court erred in finding that the appellant suffered 50% incapacity and was therefore entitled to general damages for loss of future earnings. Secondly, the trial court erred in relying on a medical report that was never placed on record to find that the appellant suffered 50% permanent incapacity.
29. The respondents urged this court to dismiss the appellant's appeal being Narok HCCA No 15 of 2015 and allow the respondents' appeal (or cross-appeal) being Narok HCCA No 8 of 2016 with costs.



30. The respondents have relied on the following authorities;
- i. *Sielle v Associated Motor Boat Co Ltd* [1968] EA 123.
 - ii. [*Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another*](#) [2014] eKLR.
 - iii. Articles 25(c) and 50(1) of the [Constitution](#) of Kenya.
 - iv. Order 18 rule 4 of the [Civil Procedure Rules, 2010](#).
 - v. Section 99 of the [Civil Procedure Act](#).
 - vi. [*Kihara Mercy Wairimu & 7 others v Kenya School of Law & 4 others*](#) [2020] eKLR.
 - vii. [*Patrick Kilonzo v Teachers Service Commission*](#) [2015] eKLR.
 - viii. [*Kenneth Nyaga Mwiye v Austin Kiguta & 2 others*](#) [2015] eKLR.
 - ix. [*Timsales Limited v Harun Thuo Ndungu*](#), civil appeal No 102 of 2005.
 - x. [*Philip Musyoka Mutua v Ngina Syoyo*](#) [2018] eKLR, Machakos civil appeal 164 of 2009.
 - xi. [*Pitalis Opiyo Ager v Daniel Otieno Owino & another*](#) [2020] eKLR.
 - xii. Section 10 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#).
 - xiii. [*Patrisia Adhiambo Omolo v Emily Mandala*](#) [2020] eKLR.
 - xiv. [*Kantara Farm Limited v Richard Ochoro Osir*](#) [2014] eKLR
 - xv. [*Kiwanjani Hardware Ltd & another v Laban Kiilu Muthoka*](#) [2008] eKLR.
 - xvi. [*Mwanthi v Mbwana Construction Co Ltd*](#) [1991] KLR.
 - xvii. [*Ndolo v Ndolo*](#) [1995] LLR 390 (CAK)
 - xviii. [*Felix Kilonzo Kieti v Kelvin Mutuku Katuku*](#) [2020] eKLR.
 - xix. [*Sentongo and another v Uganda Railways Corp*](#) Kampala HCCC No 263 of 1987.
 - xx. [*Simon Mutisya Kavii v Simon Kigutu Mwangi*](#) [2013] eKLR.

Analysis And Determination

Duty of court

31. As the first appellate court, I should re-evaluate the evidence and make own conclusions albeit bearing in mind that I neither saw nor heard the witnesses firsthand. See the case of *Selle & Anor v Associate Motor Boat Co Ltd* 1968 EA 123.

Issues For Determination

32. Arising from the pleadings, evidence, and submission of parties, the issues for determination are: -
- a. Whether HCCA No 8 of 2016 should be struck out.
 - b. Whether the medical report by Dr Theophilus Wangatta was produced as an exhibit
 - c. Whether the trial court erred in finding that the appellant did not suffer a fracture?



- d. Whether the trial court erred in its assessment of general damages?
- e. Whether the trial court erred in failing to award special damages?
- f. Whether the trial court erred in finding that the appellant was entitled to loss of earnings as a result of permanent disability.
- g. Whether the trial court erred in failing to award future medical expenses?

Whether HCCA No 8 of 2016 should be struck out.

33. On February 4, 2021, this court stated as follows;

‘I spare this appeal from the hangman’s noose as reasonable explanation have been provided by the appellant. Meanwhile, to avoid confusion, HCCA No 8 of 2016 should go back to back with this appeal. Accordingly, both files shall be mentioned on March 18, 2021.’

34. In HCCA No 15 of 2015, this court in its ruling delivered on May 13, 2021 gave the following directions;

- a. The appellant to file and serve the record of appeal within thirty (30) days from the date of receipt of certified copies of proceedings and judgment of the trial court.
- b. In the event of default by the appellant, the appeal herein will stand automatically dismissed.
- c. It appears several matters relating to the primary suit are pending, I direct parties to suggest ways of ensuring all of these matters are dealt with expeditiously and in a manner that avoids embarrassment

35. In light thereof, I find that this issue is spent.

Whether the medical report by Dr Theophilus Wangatta was produced as an exhibit

- 36. The appellant *vide* notice of motion dated November 24, 2021 sought orders that this court does apply the slip rule in this case and correct an error on the face of the trial court’s record and in the alternative to grant the appellant leave to file and adduce further evidence.
- 37. Vide the ruling delivered on June 29, 2022, this court made a finding that according to the record the trial court admitted the medical report as the plaintiff’s exhibit hence the question of whether the medical report was produced as evidence of the plaintiff does not arise.
- 38. The answer to this issue, therefore, is in the affirmative.

Whether the appellant suffered a Fracture or not?

- 39. The appellant testified as PW1. She stated that she was treated at Narok district hospital and Tenwek hospital. In support of her evidence on her injuries, she produced a discharge summary from Narok district hospital dated October 26, 2011(P Exh 6) radiologist report dated December 23, 2012(P Exh 7), an admission sheet from Tenwek mission hospital (P Exh 8), P3 form dated November 9, 2011(P Exh 3), discharge summary dated January 11, 2012 by Tenwek mission hospital (P Exh 9) and medical report by Dr Theophilus Wangatta (P Exh 10).
- 40. It was PW1’s testimony that she suffered the following injuries; fracture of the right hand, right leg cut wound, and back pain.



41. In cross-examination, PW1 conceded that Narok District Hospital was the first hospital to examine her. She stated that she got a fracture, not a dislocation as per P Exh 6 and that the said hospital omitted to state back injury and leg fracture. PW1 alleged that the discharge summary from the Tenwek Hospital indicated the fracture to the right but did not specify which right.
42. The appellant submitted that the treatment notes from the initial treatment hospital Narok District Hospital indicate a fracture of the radius. The injury is confirmed with a fracture symbol of # in the discharge summary marked P Exh 6. And concluded that, therefore, the trial court misapprehended the evidence contained in the discharge summary dated October 26, 2011.
43. The respondent urged that the appellant suffered a dislocation and not a fracture of the right wrist. He relied on the discharge summary from Narok District Hospital.
44. The arguments on whether or not there was a fracture seem to be the major issue on which parties have placed quite a premium in these appeals. This calls for tooth-pick examination of the medical records and evidence provided to court- a task that is huge and challenging, but courts are ordinarily equipped to deal with difficulty cases involving professional and specialized as well as technical practice and terminologies.
45. I will plainly squeeze out what the medical notes and reports carry.
46. The appellant was admitted at Narok District Hospital October 23, 2011 and discharged on October 26, 2011. On physical examination, it was noted that she had sustained injury of the right hand. It is indicated that x-ray indicated a dislocation of the wrist joint. She was discharged through a POP.
47. A P3 form dated November 9, 2011 indicates fracture of right hand.
48. The record card from Narok District Hospital dated December 5, 2011 indicates “check x- ray wrist”
49. The appellant was admitted at Tenwek Hospital on December 21, 2011 and discharged on December 25, 2011.
50. Tenwek hospital discharge summary diagnoses states “old colles # of the rt- closed”
51. On procedures it is indicated: -

“December 22, 2011- ORIF (2) distal radius for old placed radius # to plate”
52. At this juncture, I wish to say something about the # symbol; within medical fraternity. The symbol is widely used by doctors in Kenya to denote a fracture, although it is not a conventional symbol.
53. The foregoing notwithstanding, Dr T Wangata’s medical report dated February 23, 2012 relied on the x-ray films from Narok District Hospital that revealed a fracture. He was diligent; he ordered for an x-ray to be taken of the appellant’s right wrist and a radiology report was prepared and submitted to him. This was a follow-up x-ray done at the time of examination on February 23, 2012 at the consolidated diagnostic imaging clinic which showed an old healing fracture of the right radius with the internal fixator in position with satisfactory alignment. The x-ray also showed disuse osteoporosis.
54. Open reduction and internal fixation (ORIF) surgery was done by plating.
55. Notably, the appellant was admitted to Narok Hospital for treatment of injuries arising from the accident. The focus of this appeal is the presence or otherwise of a fracture of the right wrist. She was discharged after three days for follow-up for dressing and removal of the plaster.



56. It bears repeating that she was admitted after about two months at Tenwek Mission Hospital on account of the injuries on the wrist. The medical notes at Tenwek Hospital show that there was an old fracture of the distal ulna of the right wrist for which they conducted a surgery to place a plate. There is nothing which suggest the said injury was not suffered in the accident herein. In fact, the medical evidence establishes a direct causal link between the fracture of the right wrist to the injury she was first treated at Narok Hospital immediately following the accident. The fact that the discharge summary from Narok Hospital indicated that she suffered only a dislocation, the chain of evidence show she suffered a fracture.
57. It has been stated before that the injuries sustained by the appellant are proved through medical evidence; treatment notes, discharge summary, medical reports, the evidence by the plaintiff as well as other relevant evidence produced before court. It will be unjust, unfair and a great injustice to rely solely on a discharge summary to determine the injuries sustained by a plaintiff, and totally disregarding all other relevant pieces of evidence produced in court. The respondent seems to suggest that since the discharge summary mentions a dislocation there was not a fracture of the wrist when other relevant evidence show otherwise. I doubt a discharge summary or any single piece of evidence amidst other relevant pieces of evidence, as is the case here, would carry such sanctity and completeness as to serve as an exclusion tool in the manner suggested by the respondent in these appeals. Such evidence is to be seen and considered within all other relevant evidence produced in court.
58. I do note that the trial court noted that on the discharge summary dated October 26, 2011, the patient is noted to have suffered ‘dislocation’ only. The trial court took the view that there was no mention of ‘fracture’ as admitted by the plaintiff during her cross-examination by Mr Wekhomba, advocate. On this basis, the trial court also dismissed the medical report and all the other medical evidence which the doctor considered in making the report without close examination of all the evidence adduced for their tenor, relevance and effect. This was a serious misdirection on the part of the trial court as it invariably sparked a series of conclusions and determinations of the other relevant issues based on the thinking.
59. I am aware that a court is not bound to accept expert opinion or evidence. But, in cases such as this, medical evidence should be taken together with all other evidence on record in reaching a final decision in the case. See *Shah & another v Shah & others* (2003) I EA 290, the court held:
- “The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---”
60. The court further evaluated the utility of medical or scientific evidence in decision-making by court as follows:
- “---If there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion.”
61. The respondents did not provide any medical report to compare to the appellant’s report. The trial court solely relied on a discharge summary from Narok Hospital to disregard all other evidence including the medical report without any considered reason. Such rejection of expert or scientific evidence was wrong. Therefore, I find the trial magistrate erred in rejecting the finding by the doctor that the appellant suffered a fracture of the right wrist.
62. Reconciliation of medical evidence is that the appellant suffered a fracture of the right wrist (ulna).



Quantum

63. According to the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR : -‘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...’

Applying the test of general damages for pain and suffering

64. The trial magistrate awarded Kshs 400,000.00 as general damages. The respondents regard it to be inordinately high. The appellant on the other hand states that the award is too low in respect to the injuries sustained.
65. The amount of damages is assessed by the court after evaluation of the nature and extent of injuries; and of course, being guided by comparable awards in earlier decisions. I am content to cite the observation by the Court of Appeal in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that –
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
66. The respondents proposed an award of Kshs 100,000/= as general damages. The respondents relied on the case of *Kantara Farm Limited v Richard Ochoro Osir*[2014] eKLR. in this case, the claimant had suffered a sprain of the left hand, dislocation of the left wrist joint, and soft tissue injuries to the left hand. The appellate court reduced an award of Kshs 160,000/= to Kshs 80,000/=
67. The respondents also cited the cases of *Patrisia Adhiambo Omolo v Emily Mandala* [2020] eKLR and *Simon Mutisya Kavii v Simon Kigutu Mwangi* [2013] eKLR where the claimants had suffered fractures and the courts awarded Kshs 180,000/= and Kshs 200,000/= respectively.
68. The appellant on the other hand proposed that the award be enhanced to Kshs 850,000/=. She relied on the case of *Kirui Tea Factory & another v Peterson Watheka Wanjohi* [2008] eKLR where the claimant suffered injuries including fractures and was awarded Kshs 800,000/=
69. In *Veronicah Mkanjala Mnyapara v Charles Kinanga Babu* [2020] eKLR the claimant suffered the following injuries; a deep cut wound on the forehead, chest contusion, bruises on the face, bruises on both hands, dislocation of the left wrist joint, bruises on both ankle joints, and dislocation of the left ankle joint. The appellate court upheld the award of Kshs 300,000/=.
70. The authorities cited by the respondents are relatively old though they were made around the time the accident herein occurred. They also relate to far less serious injuries. The evidence by the appellant and the medical evidence provided show the appellant suffered, inter alia, a fracture of the right radius with the internal fixator in position with satisfactory alignment. The x-ray also showed disuse osteoporosis. The fracture left her with 50% incapacity of the right hand. These injuries were serious.
71. The trial court did not consider the fracture, hence, it fell into error.
72. In the circumstances, I find that an award of Kshs 400,000/= in general damages awarded by the trial court to be inordinately low. I set it aside.
73. In light of the authorities cited, and the injuries sustained by the appellant, I award a sum of Kshs 800,000 as reasonable compensation in amages for pain and suffering. .



Of special damages

74. PW1 produced a bundle of receipts (35 receipts) for the various payments as P Exh 9 (i-xxxvi). The bundle of receipts gives a total a sum of Kshs 52,402/=.
75. The respondents objected to the same on the ground that they did not bear the stamp duty. On that basis, the trial court rejected the claim of Kshs 52,402/= and only awarded Kshs 5,500/= as proved special damages.
76. 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. See *Joseph Kimani & another v James Kangera Kahanya* [2017] eKLR and *Maxam Limited v Heineken East Africa Import Company Limited & another* [2019] eKLR.
77. Whereas payment of stamp duty on sales is a requirement of the law, and there is an obligation that for every sales receipt issued duty should be paid and a revenue stamp affixed to the receipt, the question in this case is whether the trial court was justified in disallowing the said receipts as inadmissible in evidence given 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.
78. In Narok CMCC No 70 of 2012, the trial court, when confronted with the receipts sought to be produced before the stamp duty was paid, 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). 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 P Exh 9 (i-xxxvi) but later on, in its judgment, said that they were not admissible.
79. 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.
80. Applying the test of law, the learned trial magistrate was clearly in error in rejecting the receipts without giving the appellant an opportunity to have the receipts stamped and to pay penalties attendant thereto as provided in the *Stamp Duty Act*.
81. Accordingly, the appellant proved that she was involved in an accident and was treated as a result of injuries sustained she incurred medical expenses which she paid.
82. In the circumstances, I award the appellant Kshs 52,402/= as pleaded and proved under this head. Nevertheless, the stamp duty on those receipts shall be remitted to the government.

Of permanent disability: loss of earning and loss of earning capacity

83. At para 6 of the plaint, the appellant stated and prayed the following: -

“ 6. the plaintiff is a woman aged 50 years who enjoyed a healthy and vigorous life and a small-scale farmer cum business lady in Kisii. Her daily earnings are estimated at Kshs 500/= per



day. She has suffered loss and damages as a result of the injuries he sustained and claims damages for;-

- a. Loss of earning w.e.f date of filing suit at the rate of Kenya shillings five hundred (Kshs 500/=) per day.
- b. Loss of earning capacity and/or loss of earnings at the said rate”

84. The plaintiff therefore specifically pleaded for loss of future earnings as well as loss of earning capacity.
85. Of great importance to note is that loss of earning and future earnings are two separate and distinct concepts. This distinction between loss of earning capacity and loss of future earnings was brought out in the case of *SJ v Francesco Di Nello & another* [2015] eKLR where the Court of Appeal stated as follows:

“claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 at pg 14 wherein Lord Denning M.R said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

86. Therefore, loss of earning is special damages and must be specifically pleaded and proved. But, loss of earning capacity is in the realm of and ordinarily awarded in general damages. It may also be awarded in a separate head.
87. The trial court considered that the appellant was aged 50 years and the statutory retirement age is 60 years. The trial magistrate noted that the appellant had not provided proof of her earnings and therefore applied the minimum statutory wage for workers in the agriculture sector which at the time was Kshs 7,586/= per month.
88. In the end, the trial magistrate entered a judgment of Kshs 455,160/= in respect of loss of earnings.
89. Of proof of loss of earnings as special damages the Court of Appeal stated in *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, that:

“...Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

90. The trial court therefore erred in venturing into speculation and using minimum wage to support an award for loss of future earnings where no real evidence was adduced to prove or upon which proof of income may be justified. I set aside the award.
91. What about loss of earning capacity?
92. The trial court persuaded by the case of *Jacob Ayiaja Maruja* found that the appellant was entitled to loss of earning capacity without specifically pleading the same.



93. Nevertheless, the plaintiff pleaded loss of earning capacity in para 6 of the plaint.
94. The appellant stated that her right hand has lost its functioning. However, during cross-examination, she testified that she can still do some work and that she had largely healed.
95. Dr Wangatta in his medical report opined that the appellant had developed post-traumatic osteoarthritis of the right wrist joint that caused her 50% permanent disability on the use of her right hand.
96. The appellant is a farmer. As a farmer, she requires to use her hands to eke a living. Therefore, the permanent disability of 50% to her right wrist greatly affected her ability to work and earn as a farmer. See medical notes, P3 form, x-ray, radiology report, medical report by by Dr Wangatta and the evidence by the plaintiff. The permanent disability was assessed by Dr Wangatta.
97. The appellant was not in any formal employment. But, the law provides compensation to the appellant for the risk that she will not be able to engage effectively in farming due to the incapacity to her right wrist. She has proved this risk. She is therefore entitled to remedy for loss of earning capacity
98. I am aware, and I have already stated this, that, compensation for loss of earning capacity may be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. I am also acutely aware that the award for loss of earning capacity can be a token one, modest or substantial depending on the circumstances of each case. The circumstances of this case dictate an award in a separate head.
99. Applying the correct principles and taking into account all the relevant factors into account, loss that the plaintiff has suffered as a result of the disability should be compensated adequately with an award of Kshs 200,00, which I award
100. In the upshot, I find that the trial court erred in awarding loss of earnings. And I set it aside. The proper award is for loss of earning capacity for which I have awarded Kshs 200,000.

Of future medical expenses

101. The trial court rejected the claim for future medical expenses on the ground that the same had not been specifically pleaded. I have perused the plaint and note that the appellant pleaded at para 7 of the plaint thus;

The plaintiff further claims damages for future medical expenses estimated at Kenya shillings one hundred thousand (Kshs 100,000)
102. The law is that a claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved. See The Court of Appeal in the case of *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR.
103. The medical report by Dr Wangata confirms that the appellant will require future surgery to remove a metal fixation plate, together with subsequent follow-up treatment at an estimated cost of Kshs 100,000/=. There is therefore sufficient proof that there is absolute need for future medical expenses and the cost has been estimated. He is competent to project the nature of the need as well as the estimated costs. Therefore, the appellant proved future medical expense at a sum of Kshs 100,000. I so award her.



104. I do find that under this head, the trial court erred in not appreciating that a metal plate had been fixed to close the fracture and would require removal at some future time. This was as a result of the misdirection that there was no fracture.

Conclusion and orders

105. In the upshot I make the following orders and findings;

- i. HCCA No 8 of 2016 is properly before this court.
- ii. The medical report by Dr Theophilus Wangatta was produced as an exhibit.
- iii. The appellant proved that she suffered a fracture.
- iv. The appellant is awarded Kshs 800,000/= in general damages for pain and suffering and Kshs 200,000 for loss of earning capacity.
- v. The appellant is awarded Kshs 52,402/= in special damages but shall remit stamp duty on the receipts to the government.
- vi. The appellant did not prove loss of earnings.
- vii. The claim of future medical expenses was proved and is awarded in the sum of Kshs 100,000.
- viii. These awards are subject to the contributory negligence of 10%.
- ix. The costs and interest on the award goes to the appellant.
- x. Given that the parties herein have partly succeeded in their appeals each party shall bear their own costs of the appeal.

106. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF DECEMBER, 2022

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F. Gikonyo M.

Judge

In the Presence of:

1. Rose Obaga for Appellant
2. Karanja for Respondent
3. Kasaso – C/A

