



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 14 OF 2020**

**JULIET KEMUNTO ONDATI.....APPELLANT**

**VERSUS**

**GLADYS MWEDE MWEDE.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. S.K. Onjoro (S.R.M.)*

*dated and delivered on 1<sup>st</sup> November 2019 at the Chief Magistrates Court*

*in Kisii CMCC No. 17 of 2018)*

**JUDGMENT**

1. This is an appeal against the assessment of damages by the trial court in a personal injury claim. The parties had agreed to apportion liability at a ratio of 80:20 in favour of the appellant after which the trial court awarded the appellant Kshs. 350,000/= in general damages and Kshs. 5,000/= in special damages less liability.
2. The grounds of appeal against the trial court's decision are as follows:
  - a. That the learned trial magistrate misdirected himself in law by making an award of general damages in the sum of Kshs. 350,000/= which sum is too low in the circumstances and not commensurate with the injuries sustained by the appellant;
  - b. That the learned trial magistrate erred in law and in fact in disallowing the claim for special damages when the same had been specifically pleaded and proved;
  - c. That the learned trial magistrate erred in law and fact in failing to consider the evidence on record, appellant's submissions on quantum and authorities in support thereof;
  - d. That the learned trial magistrate misapprehended the principles applicable in commutation of damages thus occasioning miscarriage of justice
  - e. That the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching to an erroneous decision.
3. The appellant's learned counsel canvassed the grounds of appeal by way of written submissions. She argued that the award of Kshs. 350,000/= was too low considering that the appellant had sustained severe injuries which left her with long lasting effects and the risk of post traumatic arthritis. She urged this court to set aside the award made by the trial court and substitute it with an award of Kshs. 1,000,000/=. She cited the case of *Francis Ndungu Wambui & 2 others vs VK (a minor suing through next friend and mother MCWK) [2019] eKLR* in support of his submissions.
4. She also contended that the trial court had erred in failing to award the appellant a sum of Kshs. 80,000/= for the purported failure to pay stamp duty. She argued that the Stamp Duty Act did not specifically provide that payment receipts for services rendered must be stamped. That in any event, it was the duty of the person rendering the services to pay for stamp duty and charge his fees inclusive of the stamp duty paid and one could not be penalized for failing to do so.
5. The court was referred to the case of *Benjamin Muela Kimono Daniel Kipkirong Tarus & Another [2011]eKLR* where the court held:

*“Section 88 of the Act in my opinion, it is the duty of the receiver of the money who has the duty to affix revenue stamps, not the payee who cannot be penalized for omissions of the receiver.”*

6. She added that even if it had been the duty of the appellant to pay the stamp duty, the failure to have the receipts stamped would not render them inadmissible in evidence, if she had not been given an opportunity to comply as per the decision of the court in **George Kigamba vs Buuri Dairy Farmers Co-operative Society [2018]eKLR**.

7. On future medical expenses, counsel submitted that Dr. Morebu had confirmed the appellant’s assertion that she needed a further operation to remove metal implants which would cost her a sum of Kshs. 200,000/=. Dr. Gaya had also affirmed the need to remove the metal implants but estimated that their removal would cost Kshs. 100,000/=. The appellant’s counsel relied on the case of **Peter Ngugi Kimani vs Joseph Kariuki [2018]eKLR** where the court had upheld an award of Kshs. 200,000/= under this heading. Counsel concluded his submissions by urging this court to set aside the trial court’s award and substitute it with an all-inclusive sum of Kshs. 1,285,000/=-.

8. For his part, learned counsel for the respondent supported the trial court’s award of Kshs. 350,000/= for being reasonable and based on the evidence on record. He submitted that the testimonies of the doctors and the documents produced on trial clearly indicated that the injuries sustained by the appellant were not grievous and were healing well, with no permanent disability. He also argued that the appellant had not proved via cogent evidence that she indeed sustained a fracture of the right tibia. Counsel submitted that Dr. Morebu, was not an expert in bones and could not ascertain to the court whether the appellant sustained the alleged fracture. To buttress this argument, counsel relied on the case of **Hassan Noor Mahmoud vs Tae Youn Ann [2001]eKLR** where the court held:

*“It is imperative that where a litigant has sustained injuries and a medical report is hereby required, that the doctor who prepares the report must be an orthopedic consultant, where injuries involve the bones. That is, the doctor must specialize in the same field of medicine as the injuries that have occurred.”*

9. This court was also referred to the imaging request form for x-ray, ultra sound, dental and ECG which indicated that there was a possibility of the patient having sustained a fracture of the tibia/fibula but the result of the clinical information was that the patient sustained pain on the right leg and no fracture was observed. Counsel also pointed out that no x-ray film had been produced before the trial court which meant that the appellant had not sustained any fracture.

10. The respondent’s counsel also supported the trial court’s finding that under Section 19 and 20 of the Stamp Duty Act, a receipt for which one wishes to claim special damages must first be taken for Stamp Duty payment before one can claim damages. He relied on the case of **Agnes Wanjiku Ndegwa vs David N. Waweru [2014]eKLR** where the court held:

*“Under the Stamp Duty Act section 19 in civil cases any party wishing to claim expenses paid to him under the special damages claim and on proof of such claim must have complied with the Stamp Duty Act.”*

11. Counsel urged that the trial court’s finding was in line with the above authority. He added that the court had taken into account all the facts and the law applicable in arriving at the respective amounts thus its judgment ought to be upheld.

12. Before I determine the issues arising in this appeal, I will remind myself of the duty of this on a first appeal which is to re-evaluate, analyze the evidence afresh and make its own independent conclusion bearing in mind that it did not see or hear the witnesses give evidence.

13. At the hearing of the matter before the trial court, the appellant, Juliet Kemunto (PW2) testified that she was walking along Kisii-Kilgoris Road on 9<sup>th</sup> August 2018 at about 7 p.m. when she was knocked down by the respondent’s vehicle at the junction of Kisii University. She testified that as a result of the accident she had sustained a fracture on the right leg and a metal implant was inserted in it. She also got injuries on the chest and back. She was treated at Christamariane Hospital and later transferred to Tenwek Hospital where she got admitted. The appellant reported the accident at Kisii Police Station and was given a P3 form and a police abstract. She testified that she had also seen Dr. Peter Morebu Momanyi and had paid him Kshs. 5,000/=. She also stated that she had spent a sum of Kshs. 80,000/= for treatment. During cross examination, the appellant testified that she was admitted at Tenwek Hospital from 9<sup>th</sup> August 2017 and discharged on 18<sup>th</sup> August 2017. She stated that she had not healed well and that the last time she went to hospital was on 18<sup>th</sup> July 2018.

14. Dr. Peter Morebu Momanyi (PW1) testified that the appellant had sustained a fracture of the right tibia bone, blunt trauma to the back and chest contusion. He stated that the appellant got metal implants and received antibiotics and analgesics. According to Dr. Morebu, the plaintiff was expected to take a long time to recover. She was required to undergo another operation to remove the metal implants which would cost Kshs. 200,000/=. In cross examination, Dr. Morebu testified that unless he examined the appellant, he could not tell if she had healed.

15. Musyoka Nzoka (PW3) told the court that he was in charge of statistics and medical records at Tenwek Mission Hospital. He testified that from their records, the appellant was a patient of the hospital between 9<sup>th</sup> August 2017 to 18<sup>th</sup> August 2017. The hospital records showed that the appellant sustained a fracture of shaft of tibia and there was a placement of nail which was done to enable healing of the fracture.

16. When cross examined, PW3 admitted that he was not the one that had treated the patient. He also stated that their documents did not indicate that there was loss of consciousness by the patient. He however insisted that the discharge summary showed that there was a fracture.

17. PC Caleb Osodo (PW4) who was stationed at Kisii Central police station produced a police abstract confirming that the road accident had occurred.

18. The trial court record shows that at the request of the respondent's counsel, the appellant underwent a second medical examination which was conducted by Dr. Gaya. The report dated 26<sup>th</sup> March 2019 was produced in evidence by the consent of the parties.

### **ANALYSIS AND DETERMINATION**

19. The fact that the appellant sustained injuries when she was knocked down by the respondent's vehicle registration mark KBS 659 L along Kisii- Kilgoris on 9<sup>th</sup> August 2017 is not disputed. In her pleadings the appellant particularized the injuries she had sustained as:

- a. Fracture of the right tibia;
- b. Blunt trauma to the back; and
- c. Chest contusion.

20. The trial court found that the appellant had sustained the injuries as particularized in the plaint as they had been confirmed by the medical report of Dr. Peter Morebu Momanyi. The respondent has challenged the trial court's finding on the nature and extent of the injuries. Her contestation on the extent of the injuries appears to me to be an afterthought as she did not file a cross appeal against the decision of the court.

21. Based on the exhibits and the testimonies given during the trial, this court is unable to agree with the respondent's argument that the appellant did not sustain a fracture. Dr. Morebu testified that his medical report was based on the appellant's treatment notes and her P3 form which indicated that she had a fracture of the tibia, blunt trauma to the back and chest contusion. On examination of the appellant, he found that she was in fair general condition. He noted that the appellant had surgical incision scars on the right leg and had tenderness on the right leg. The doctor indicated that the appellant was unable to walk without support and the recovery was expected to take a very long time which would require physiotherapy and occupation therapy. PW3 confirmed that the appellant had been admitted at Tenwek Mission Hospital between 9<sup>th</sup> August 2017 to 18<sup>th</sup> August 2017 and had a nail inserted to enable the healing of a fracture of the shaft of the tibia.

22. Dr. Gaya, who gave evidence for the respondent similarly perused the clinical notes and found that they confirmed segmental fracture of the right Tibia and Fibula. He noted three surgical scars on the appellant's right leg and confirmed that the appellant had a nail in situ, which would require removal. He added that the appellant was likely to develop early post traumatic osteoarthritis of the right knee and ankle joints but at the time there was no permanent disability.

23. The decision of *Hassan Noor Mahmood (supra)* which was cited by the respondent was to the effect that only an orthopedic consultant can prepare a medical report where the injuries involve bones is a decision of court of concurrent jurisdiction and not binding on this court. Dr. Morebu described himself as a general practitioner practicing at Kisii Teaching and Referral Hospital whereas Dr. Z. Gaya described himself as a consultant surgeon. In my view, these medical practitioners had sufficient knowledge to examine the appellant and analyze her treatment notes and establish whether or not she had a fracture of the tibia. Their observations that the appellant had sustained a fracture of the tibia was corroborated by the medical reports produced by PW3 from Tenwek Hospital, where the appellant had been admitted. The evidence presented before the trial court proved on a balance of probabilities, that the appellant suffered a fracture of the right tibia, blunt trauma to the back and chest contusion as a result of the accident. The medical reports of Dr. Morebu and Dr. Gaya were admitted into evidence with no protest from the respondent. I therefore find that the trial court did not err in its finding on the extent and the nature of the appellant's injuries. That leads me to the appeal on the assessment of general damages.

24. As a principle, an appellate court will only interfere with the trial court's discretion in the assessment of damages if it is inordinately high or low as to represent an erroneous estimate, consideration of wrong principles or a misapprehension of the evidence in some material respect. (See *Butt v Khan(1982-88) KAR*).

25. The approach taken by courts in the assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards although the court should bear in mind that no two cases are exactly the same. The court will also consider factors such as the state of the economy and the rate of inflation in its assessment of damages. (See *Stanley Maore v Geoffrey Mwenda [2004] eKLR* and *Ugenya Bus Service v Gachoki [1982] eKLR*)

26. In support of her proposal for an award of Kshs. 1,000,000/= the appellant cited the cases of *Thomas Muendo Kimilu vs Ann Maina & 2 Others [2008] eKLR* and *Florence Njoki Mwangi vs Peter Chege Mbitiru [2014] eKLR*.

27. The plaintiff in the case of *Thomas Muendo Kimilu (supra)*, had *sustained segmented fractures of the right leg tibia-fibula with marked swelling, fracture of the left humerly and partial amputation of the left index finger and injury to the left middle and little fingers*. She was awarded Kshs. 700,000/= as general damages by the court in 2008. The court in *Florence Njoki Mwangi (supra)*, awarded the plaintiff, who had sustained broken femurs bilaterally, two de-gloving injuries of the right knee and the right ankle, a sum of Kshs. 700,000/= as general damages.

28. Evidently, the injuries in the authorities cited by the appellant were more severe than those she had sustained. The appellant has referred this court to the decision of *Francis Ndungu Wambui (supra)* but that decision is also inapplicable since the respondent in that matter sustained compound fracture of the distal tibia fibula shaft which caused him to be at the risk of secondary stress fractures on the same site. That was not the case for the appellant. Dr. Gaya who examined the appellant during the course of the trial stated that she had no signs of permanent disability. At the time she was examined by Dr. Morebu, the appellant could not walk without support but was walking with a very slight limp when she was examined by Dr. Gaya and appeared to be healing well. PW3 also confirmed that she had not lost consciousness unlike the respondent in *Francis Ndungu Wambui (supra)*.

29. The respondent relied on the case of *Isaac Mwenda Michemi versus Muregi Muroongo [2004] eKLR* in support of her proposal for an award of Kshs. 150,000/= before the trial court. The plaintiff in that case had suffered a fracture of the left tibia and fibula and soft tissue injuries and was awarded general damages of Kshs. 100,000/=. The trial court rightly observed that the plaintiff in *Isaac Mwenda Michemi (supra)* had sustained injuries similar to the appellant but awarded her a higher sum of Kshs. 350,000/=.

30. In *Paul Muiruri Njau v David Waruinge Gichia & another [2020] eKLR*, the court substituted an award of Kshs. 250,000/= with an award of Kshs. 350,000/= for a fracture of the right tibia/fibula whereas the court in *Zacharia Mwangi Njeru vs Joseph Wachira Kanoga [2014] eKLR* awarded the plaintiff who had suffered a fracture of the tibia/fibula Kshs. 400,000/=. I therefore find that the trial court properly exercised its discretion as the award of Kshs. 350,000/= reflected recent comparable awards.

31. Next I turn to the appeal on special damages. The basic principle that guides the award of special damages is that they must be strictly pleaded and proved. The Court in the case of *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR* set out this legal position thus:

*“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”*

32. The appellant is aggrieved by the trial court’s finding that the receipts he produced to prove special damages were inadmissible because no stamp duty had been paid for them. The relevant law on this issue is **Section 19** of the **Stamp Duty Act** which stipulates:

**19. Non-admissibility of unstamped instruments in evidence; and penalty**

*(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-*

*(a) in criminal proceedings; and*

*(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.*

*(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.*

*(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—*

*(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;*

*(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;*

*(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.*

33. The trial court relied on the case of *Leonard Nyongesa vs Derrick Ngula Rigba [2014]eKLR* where the court 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 any damages based on such a receipt.*

34. The respondent has also referred to the case of *Agnes Wanjiku Ndegwa vs David N. Waweru [2014] eKLR* where the court similarly held that a party wishing to claim expenses under special damages claim must have complied with the Stamp Duty Act.

35. For her part, the appellant has referred this court to the case of *George Kigamba (supra)* where the court was of a contrary view. In that case, Gikonyo J. held:

*“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. Non-compliance thereof does not per se invalidate or render the receipts herein inadmissible in evidence. The Appellant ought to have been given an opportunity to comply or pay the requisite penalty. The Appellant proved that his vehicle was involved in an accident and was damaged as a result; he repaired it and incurred expenses which he paid.”*

36. The finding of the court in the above matter was informed by the decision of the Court of Appeal in **Paul N.Njoroge Vs. Abdul Sabuni Sabonyo [2015]eKLR** where the Court 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. Ignazio 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 vs. 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. -vs- Bhaloo (1958) EA 762 at page 763** where Law J., (as he then was) quoted with approval the holding in **Bagahat Ram -vs- 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 ...

The Appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/Respondent and he must be given the opportunity”.

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.

22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer, Thetu Theuri Gitonga (PW7-sic), and the consultant physiotherapist, Paul John Mwangi (PW7), both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs. 38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof.”

37. The decision by the Court of Appeal is binding on this court as well as the trial court. Consequently, I find that the trial court erred in rejecting the receipts that had been produced by the appellant in support of her claim for special damages on the basis that she had not complied with the Stamp Duty Act as it had not given her an opportunity to pay the requisite stamp duty and penalty prescribed under the Act.

38. The appellant particularized her claim for special damages as follows:

- a. Treatment and transport expenses Kshs. 80,000/=
- b. Cost of search of motor vehicle Kshs. 550/=
- c. Demand registration fee Kshs. 105/=
- d. Cost of preparation of medical report Kshs. 5,000/=
- e. Doctor’s charges to attend court Kshs. 6,000/=
- f. Reasonable expenses to attend an anticipated medical examination Kshs. 3,000/=.

39. She produced a bundle of receipts for treatment totaling Kshs. 81,059/= for her treatment, demand registration fee receipt for Kshs. 105/= and a receipt of Kshs. 5,000/= for the preparation of a medical report. This evidence partially supported her claim for special damages. I therefore find that the appellant was entitled to a sum of **Kshs. 85,105/= in special damages**.

40. The appellant was also entitled to future medical expenses for the removal of metal implants that had been inserted into her leg to aid in her recovery. She had averred in her plaint that she would require approximately Kshs. 200,000/= for their removal. Both Dr. Morebu and Dr. Gaya confirmed that the appellant had implants which needed to be taken out. The appellant’s estimate was supported by testimony of Dr. Morebu who indicated that the appellant would need to undergo another operation which would cost approximately Kshs. 200,000/= .Dr. Gaya on the other hand put the cost of the removal of the metal implants at Kshs. 100,000/=. I will take the middle ground and award the appellant a sum of Kshs. 150,000/= for future medical expenses.

41. The upshot is that this appeal is partially allowed. I substitute the award made by the trial court with an award of **Kshs. 468,084/=** made up as follows:

- a. General damages Kshs. 350,000/=
- b. Special damages Kshs. 85,105/=
- c. Future medical expenses Kshs. 150,000/=

585,105

Less 20% contribution of Kshs. 117,021 /=

**Total Kshs. 468,084/=**

42. As the appeal has only been partially successful, the appellant is awarded a third ( $\frac{1}{3}$ ) of the costs of the appeal. Interest shall accrue on the above sum at court rates.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF FEBRUARY 2021.**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

<b>Appellant</b>	<b>Absent</b>
<b>Respondent</b>	<b>Absent</b>
<b>Appellant</b>	<b>In person</b>
<b>Ms. Rael</b>	<b>Court Assistant</b>