REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 118 OF 2016

REUBEN WEKESA KITUYI.....1ST APPELLANT

ISAAC SIMIYU KITUYI.....2ND APPELLANT

-VERSUS-

ASMIN TERESA OSUNDWA

(alias ASMIN TERESA MOHAMMED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa, Chief Magistrate, delivered on 13 July 2016

***in Eldoret CMCC No. 629 of 2012*)**

JUDGMENT

[1] This appeal arises from the decision of the Chief Magistrate in **Eldoret CMCC No. 629 of 2012: Asimini Teresa Osundwa alias Asmin Teresa Mohammed vs. John Njakusi Kituyi & 2 Others,** rendered by Hon. C. Obulutsa on **13 July 2016**. In the said suit, the respondent herein had sued the appellants, claiming general and special damages as compensation for injuries sustained by her on **8 September 2011** when she was knocked down by motor vehicle **Registration No. KBE 578L,** Toyota Noah Station Wagon, while she was walking on the verge of the Pioneer Road in Eldoret Town.

[2] The respondent had contended that the accident was attributable solely to the negligence of the 1st appellant in the course of driving the said motor vehicle; and supplied the particulars of negligence at paragraph 7 of her Further Amended Plaint, filed on **8 October 2015**. She, likewise, furnished the particulars of the injuries suffered as well as particulars of special damage; on the basis of which she claimed compensation.

[3] The appellants opposed the claim on the basis of their Further Amended Statement of Defence filed on **4 April 2014**. They not only denied that they were the joint owners of the subject motor vehicle the material time, but also that an accident occurred on **8 September 2011** in the manner and place alleged by the respondent in paragraph 6 of her Further Amended Plaint. They also denied the allegations of negligence and the particulars of injuries and special damage pleaded by the respondent. They proceeded to aver, in the alternative that, if the accident occurred as alleged, then the same was caused solely, or was substantially contributed to, by the negligence on the part of the plaintiff.

[4] Although the proceedings are not explicit on this, the parties settled the question of liability by consent at the ratio of 15:85% in favour of the respondent. This is discernible from the written submissions filed before the lower court by learned counsel for the parties. Thus, the single issue that the lower court was called upon to resolve is the issue of quantum of damages payable. And, having taken into consideration the evidence adduced before it by the respondent and her witness, as well as the written submissions filed by counsel for the parties, the lower court assessed general damages at **Kshs. 1,000,000/=** and special damages at **Kshs. 8,872/=.** Accordingly, the lower court entered Judgment in the respondent's favour on **13 July 2016** in the total sum of **Kshs. 857,558.20**, having factored in the agreed contribution of 15%.

[5] Being dissatisfied with the award, the appellants filed this appeal on **15 August 2016** on the following grounds:

> **[a]** That the learned trial magistrate erred in law and fact in awarding the respondent a sum of **Kshs. 8,872/=** as special damages, which were not proved to the requisite standard.

[b] That the learned trial magistrate erred in law and fact by awarding the respondent a sum of **Kshs. 1,000,000/=** as general damages; which amount was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.

[c] That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained by the respondent as evidenced on the medical chits and/or reports.

[d] That the learned trial magistrate erred in law and fact in disregarding relevant evidence on record, hence arriving at a wrong decision.

[e] That the learned trial magistrate erred in law and fact in failing to consider the appellants' submissions and the authorities relied on in support of their defence.

[f] That the learned trial magistrate erred in law and fact by overly relying on the respondent's submissions and authorities; which were not relevant to the case at hand.

[g] That the learned trial magistrate's decision albeit a discretionary one, was plainly wrong.

[6] The appeal was urged by way of written submissions, filed on the appellants' behalf on **10 February 2021** by the firm of **M/s Omwenga & Company Advocates.** The case of **Abok James Odera, A.J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR was cited by the appellants' counsel to underscore the duty of an appellate court such as this. He proposed two issues for determination, namely:

[a] Whether the learned trial magistrate erred in law and fact by awarding the respondent a sum of **Kshs. 1,000,000/=** as general damages; and,

[b] Whether the learned trial magistrate erred in law and fact by awarding the respondent a sum of **Kshs. 8,872/=** as special damages.

[7] Thus, it was the submission of **Mr. Omwenga** that an award of general damages ought to correspond with the injuries sustained; while recognizing that money cannot renew a damages physical frame. He relied on **Tayab vs. Kinanu** [1983] eKLR in which the case of **West (H) and Son Ltd vs. Shepherd** [1964] AC was relied on. He urged the Court to find that the injuries sustained by the respondent were not so serious as to attract the general damage award of **Kshs. 1,000,000/=.** Counsel accordingly urged for a re-evaluation of the said award with a view of reduction. In his view, the respondent sustained soft tissue injuries by way of blunt trauma to the left shoulder, left leg and abdomen; and therefore that it was erroneous for the court to take into account the respondent's allegation of a subsequent premature birth. Hence, counsel referred the Court to **Kemfro Africa Limited T/A Meru Express Services & Others vs. Olive Lubia** [1982-88] 1 KAR 727 as to the applicable principles in such instances. He urged the Court to be guided by the cases of **Gabriel Maina Mungai vs. Jane Wanjiku Mwaura** [2010] eKLR and **Richard Andanje Abwalaba vs. Farm Industries Ltd** [2006] eKLR in determining what would be a reasonable award in the circumstances.

[8] **Mr. Omwenga** also took issue with the fact that the primary treatment documents were never produced as exhibits before the lower court to show the nature of the exact injuries the respondent was treated for immediately after the accident. He, accordingly faulted the trial magistrate for having brushed the issue aside on the ground that it was inconsequential. In his submission the treatment chit was extremely crucial in this case, as it was the only means by which the lower court could ascertain the nature and extent of the injuries sustained by the respondent; and whether the subsequent medical reports were in tandem with the contents of that primary document. Thus, **Mr. Omwenga** proposed that an award of **Kshs. 60.000/=** would suffice in the circumstances as general damages and that the sum of **Kshs. 1,000,000/=** awarded by the lower court was so excessive as to be an erroneous award. He relied on **Jotham Murungi vs. Dancan Mwenda** [2018] eKLR in which the plaintiff was awarded **Kshs. 60,000/=** for bruises on the right elbow and on the right leg.

[9] As for the special damages component, **Mr. Omwenga** submitted, on the authority of **Wakim Sodas Limited vs. Sammy Aritos** [2017] eKLR that special damages must be pleaded with particularity and then strictly proved for the same to be awarded. He pointed out that, whereas the respondent claimed **Kshs. 8,892/=** as special damages, she produced receipts for **Kshs. 6,892/=** only; and therefore that there was no justification for the lower court's special damage award of **Kshs. 8,892/=**. He further submitted that, since the receipts that were relied on by the respondent did not bear a KRA stamp as required by **Section 19 and 20** of the **Stamp Duty Act,** they were of no probative value at all. He cited the case of **Leonard Nyongesa vs. Derrick Righa Gula** [2013] eKLR and urged the Court to find that the receipts aforementioned ought to have been ruled inadmissible; with the result that, in essence, no evidence was adduced in proof of the special damages claimed by the respondent.

[10] **Mr. Wafula**, learned counsel for the respondent, relied on his written submissions dated **5 March 2021.** He urged the Court to note that the appellants never tendered any evidence to controvert the respondent's evidence before the lower court. According to him, the respondent proved on a balance of probabilities that she sustained serious injuries, including blunt trauma to the abdomen, which resulted in the termination of her pregnancy. **Mr. Wafula** further submitted that the appellants are completely wrong in their contention that the respondent's abortion could only be resolved by the production of the initial treatment notes. In his view, the *viva voce* evidence tendered by the respondent, as supported by the evidence of the expert witnesses, was sufficient to prove that issue to the requisite standard. Counsel relied on the cases of **Ben Ocharo & Others vs. Kenya Farmers' Co-operative Society**, Kisii High Court Civil Appeal No. 91 of 2006 (UR) as cited in **Henry Binya Oyala vs. Sabera O. Itira** [2011] eKLR.

[11] It was therefore the submission of **Mr. Wafula** that, on the basis of the uncontroverted evidence placed before the lower court by the respondent, the trial magistrate's award is reasonable. He urged the Court to bear in mind that no two cases are exactly the same for one to form a perfect basis of the other. Thus, while acknowledging the principle that comparable injuries should attract comparable awards, subject to the question of inflation and the rising cost of living, counsel urged the Court take into account the following authorities:

[a] **Kerina Olonde vs. Akamba Public Road Services Ltd**; Nakuru HCCC No. 16 of 1996 in which the plaintiff was awarded **Kshs. 2,000,000/=** for injuries that included traumatic abortion.

[b] **Mackenzie vs. Mac Rae** [1984] O.J. No. 1007 cited at page 19 of **Nairobi HCCC No. 399 of 2010: P B S & Another vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others**, in which the trial court awarded **USD 15,000** for pain and suffering to a mother who lost a foetus;

[c] **Mathison vs. Hofer** [1984] 3 WWR 343 (Man Q.B.) cited at page 19 of **Nairobi HCCC No. 399 of 2010** (supra) in which the plaintiff was awarded **USD 7,000** for the psychiatric illness she suffered as a result of the loss of a fetus at 38 following a motor vehicle accident.

[12] This being a first appeal, it is the duty of this Court to reconsider and re-evaluate the evidence adduced before the lower court with a view of making its own conclusions thereon. It is also imperative to bear in mind that this Court did not have the advantage of seeing or hearing the witnesses; and therefore that it must make an allowance for that in its re-evaluation. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[13] With the foregoing principles in mind, I have given careful consideration to the evidence placed before the lower court in the light of the pleaded injuries. The respondent testified on **9 December 2015** as **PW1**. She adopted her witness statement dated **1 August 2012**. Her evidence was that she was working as a security guard at the material time; and that on **8 September 2011** at about 10.00 a.m., she was walking on the verge of the road within Pioneer estate when, all of a sudden, motor vehicle **Registration No. KBE 578L** hit her from behind and knocked her down, thereby occasioning her injuries that included blunt trauma to her abdomen. She added that she was trapped underneath the said motor vehicle, from where she was rescued and rushed to **Moi Teaching and Referral Hospital;** and that she was admitted for treatment for three days. The respondent further told the lower court that after two weeks or so, she suffered a miscarriage and had to be rushed back to the hospital; and was admitted for a further two days.

[14] The respondent also mentioned that she spent **Kshs. 4,892/=** towards her treatment and produced Receipt No. 815464 dated **1 October 2011** in proof thereof. She added that the accident was reported to **Eldoret Police Station**; whereupon she was issued with a P3 Form. She further told the lower court that the P3 Form was filled at **Moi Teaching and Referral Hospital**; and that she had to pay **Kshs. 2,000/=** in that regard. She produced the Receipt No. 830249 dated **17 October 2011** as the **Plaintiff's Exhibit No. 7b** before the lower court. Thereafter, the respondent consulted **Dr. S.I. Aluda** for examination and the compilation of a medical report as to the nature and extent of her injuries. The report was produced by **Dr. Rono (PW2)** and was marked the **Plaintiff's Exhibit No. 8a** before the lower court.

[15] **Dr. Rono**, a medical doctor attached to **Moi Teaching and Referral Hospital** gave his evidence before the lower court on **9 March 2016**. He confirmed that the respondent was treated at their facility following a road traffic accident; and that her P3 Form was filled and signed by **Dr. Embenzi,** who had since retired. He added that he had been summoned to attend court on behalf of **Dr. Embenzi**. He accordingly confirmed, from the hospital records, that the respondent sustained a blunt injury on the left leg, left shoulder and abdomen; and that she was 36 weeks pregnant as at the time of the accident. He further testified that, due to her injuries and the bleeding entailed thereby, she had a premature birth. **Dr. Rono**, thus, produced the medical documents, including medical report prepared by **Dr. Aluda** as the **Plaintiff's Exhibit No. 1-9** before the lower court.

[16] The last witness before the lower court was one **Concepta,** an employee of the Judiciary, deployed at the Traffic Registry at Eldoret Law Courts. She produced **Traffic File No. 3354 of 2011** in which the 1st appellant, **Reuben Wekesa Kituyi**, was charged with the offence of careless driving.

[17] The foregoing being the evidence, and given the grounds of appeal put forward by the appellants, the single issue that emerges therefrom for determination is whether or not the learned trial magistrate erred in his assessment of general and special damages. Needless to mention that while assessment of damages is in the discretion of the trial court, it is trite that awards, must of necessity, be proportionate to the injuries sustained and the peculiar facts of each case. It is also often useful to bear in mind the words of caution expressed in **H. West & Son Ltd vs. Shephard** [1964] AC 326, that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[18] Thus, an appellate court will not disturb an award unless sufficient cause be shown to warrant such interference. The Court of Appeal restated as much in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, when it held that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately**

high that it must be a wholly erroneous estimate of the damages." (Also see **Butt vs. Khan [1981] KLR 349)**

[19] Likewise, in **George Kirianki Laichena vs. Michael Mutwiri**, Civil Appeal No. 162 of 2011, the Court of Appeal held that:

> **"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case…"**

[20] As a rule of thumb, the Court of Appeal held, in Stanley Maore vs. Geoffrey Mwenda [2004] eKLR, that comparable injuries ought to be compensated by comparable awards. It expressed itself thus:

> **"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

[21] From the evidence presented by both the respondent and **Dr. Rono**, the respondent sustained blunt trauma to the left shoulder, left leg and her abdomen. While that evidence is uncontroverted, it is noteworthy that counsel for the appellants spiritedly argued that there was no proof that the respondent was pregnant at the time or that she suffered an abortion due to the accident. This argument was hinged on the fact that the initial treatment chit was never produced by the respondent before the lower court.

[22] I have given this argument careful thought in the light of the entire body of evidence placed before the lower court by the respondent. To begin with, it is pertinent that the respondent's own evidence as to her miscarriage was not rebutted by the appellant. In fact, no evidence at all was adduced by the appellants before the lower court. Secondly, the record of the lower court shows that one of the documents exhibited by the respondent was a Radiology Request/Report Form dated **8 September 2011** (marked **the Plaintiff's Exhibit 6a)**. It clearly shows that the patient had been involved in a road traffic accident; and on the reverse thereof, the Obstetrician's report is explicit that the respondent had a 36 weeks single live intrauterine foetus in a cephalic presentation; thereby confirming that, as at the date of the accident, which was **8 September 2011,** the respondent was pregnant.

[23] Additionally, the respondent produced a Consultation Request Form dated **9 September 2011** (**the Plaintiff's Exhibit 4).** It shows that the reason for consultation was the established fact that the patient had a foetus of about 36 weeks. Additionally, the P3 Form that was produced as **the Plaintiff's Exhibit 2,** shows, per Section B thereof, that after the accident, the respondent **"…developed PV pleading and later miscarried following the accident. LMP 23/03/2011. Aborted a week following accident…"** Thus, it is manifest that when, on **25 February 2012, Dr. Aluda** came to the conclusion that the respondent's injuries included blunt trauma to the abdomen which led to the miscarriage of her 6 months' old foetus, that conclusion was premised on sound basis. In the circumstances, it is plain that **Mr. Nyamweya's** argument, namely, that there was no proof of the respondent's pregnancy or that she had a miscarriage following the subject road traffic accident, is untenable.

[24] I am therefore in complete agreement with the position taken by **Hon. Asike Makhadia, J.** (as he then was) in **Ben Ocharo & Others vs. Kenya Farmers' Co-operative Society** (supra) that:

> **"…the primary source of information about injuries sustained in an accident if at all is by the victim himself. He will tell the story. Next in line will be … witnesses of the accident. There may also be people who have an intimate knowledge of the injured person who have lived or worked with him for a reasonably long time who may also have useful information to give of the injuries and his condition. Of course then there are the medical records starting with the treatment notes through to medical reports prepared by the medical personnel who examined them. However, the information from the victim is valuable and is complementary to the doctor's report. Therefore whereas the initial treatment records are no doubt of tremendous value they are not the only ones, to prove injuries sustained in a road traffic accident as the learned magistrate tended to think. Such injuries can be proved by word of mouth by the victim himself. Accordingly, a victim's own statement with regard to the injuries should not easily be dismissed merely on the grounds that it was not matched by initial treatment [documents] from the hospital. It is worthy reiterating what Ringera, J. (as he then was) said in the case of Peterson Gutu Ondieki vs. Daniel Gichohi, HCCC No. 4018 of 1990 (UR). He held that non-production of a medical report was not necessarily fatal to a plaintiff's case. That the injuries sustained can be established through oral evidence of the victim…"**

[25] That said, the next question to pose is whether the lower court's award of **Kshs. 1,000,000/=** was reasonable in the circumstances. I note that counsel for the respondent had proposed an award of **Kshs. 2,000,000/=,** which the learned trial magistrate found to be on the higher side. He discounted the case of **Kerina Olonde vs. Akamba Public Road Service Ltd** (supra) which counsel relied, and rightly so in my view, granted that it involved fractures in addition to traumatic abortion. The respondent herein suffered no such fractures. The learned trial magistrate further took into account the written submissions and authorities relied on by the appellants to buttress the sum proposed by their counsel. It is therefore not correct for the appellants to contend, as they did in Ground 5 of their Grounds of Appeal, that the lower court failed to consider their submissions and the authorities relied on in support thereof.

[26] Having come to the conclusion that the approach taken by **Mr. Nyamweya** was misguided by his belief that traumatic abortion was not proved, it follows that his proposal for an award in the sum of **Kshs. 60,000/=** is indefensible. On that account, I find the authorities relied on by him unhelpful. On the other hand, it cannot be said that the lower court committed an error of principle; or that it took into account irrelevant factors; or even that the award of Kshs. 1,000,000/= was so inordinately high as to represent an erroneous estimate of the compensation due to the respondent for her injuries. I therefore find no justification for disturbing the award made by the learned trial magistrate on general damages.

[27] As for special damages, it is trite that the same ought to be not only specifically pleaded but also proved. At paragraph 8 of the Further Amended Plaint, the respondent asked for **Kshs. 8,892/=** as special damages, computed as hereunder:

[a] Medical expenses……Kshs. 4,892/=

[b] Medical Report…….Kshs. 1,500/=

[c] Fee for filling P3 Form…….Kshs. 2,000/=

[d] Fee for motor vehicle search…….Kshs. 500/=

[28] The respondent produced receipts marked the **Plaintiff's Exhibits 7a, 7b and 7c** before the lower court in proof of the special damages pleaded. Thus, for the invoice marked **Exhibit 7a,** there is a receipt for **Kshs. 4,892/=** bearing the date stamp of **1 October 2011.** The respondent also produced a receipt for **Kshs. 2,000/=** issued to her by Moi Teaching & Referral Hospital for filling the P3 **(marked Exhibit 7b)** for the amount she paid to have the P3 filled by **Dr. Embenzi.** It is dated **17 October 2011** and that date corresponds with the date on which the P3 marked **Exhibit 2** was filled. There is also on record a receipt issued by **Dr. S.I. Aluda, MD,** for **Kshs. 1500/=.** It is dated **25 February 2012,** and was marked the **Plaintiff's Exhibit 8b.** It accounts for the Medical Report dated **25 February 2012.** What remains unsupported, therefore, is the amount of **Kshs. 500/=** that was allegedly paid to the Registrar of Motor Vehicles for the Copy of Records dated **15 November 2011 (**at page 14 of the Record of Appeal). Hence the special damages component is hereby reduced by that sum of **Kshs. 500/=.**

[29] As for the submission of **Mr. Omwenga** that the receipts are of not probative value from the standpoint of **Sections 19 and 20** of the **Stamp Duty Act,** I note that my attention drawn to the persuasive case of **Leonard Nyongesa vs. S. Derrick Righa Gula (supra)** in which the court declined to award special damages in respect of unstamped receipts pursuant to **Sections 19 and 20** of the **Stamp Duty Act. Section 19** provides that:

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

[30] it is true that two of the receipts, the **Plaintiff's Exhibit 7b and 7c** are computer generated; and therefore are unstamped for purposes of **Section 19** aforestated. It is noted however that the receipt dated **25 February 2012,** issued by **Dr. Aluda** for **Kshs. 1,500/=** is indeed stamped and is therefore compliant. As to whether the two unstamped receipts issued by **Moi Teaching and Referral Hospital** are of no probative value, the Court of Appeal has expressed itself on this point in several decisions and made it clear that it is not necessarily the case that an unstamped receipt is invalid and inadmissible. For instance, in **Paul N. Njoroge vs. Abdul Sabuni Sabonyo [2015] eKLR,** the Court of Appeal held that:

> **"21. The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR where it stated thus:**
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> ***"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: -***
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> ***"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:***
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> ***"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".***
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> **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.**

[31] Accordingly, there is no reason to fault the learned trial magistrate for placing reliance on the respondents unstamped receipts as proof of the special damages claimed by the respondent.

[32] In the result, save to the extent aforementioned in respect of the special damages awarded, the appeal fails and is hereby dismissed with costs. The Judgment and Decree of the lower court is accordingly adjusted and substituted with Judgment in the respondents' favour in the aforementioned sum of **Kshs. 1,008,392/=** less 15% contribution, together with interest and costs. Interest to accrue from the date of the

lower court’s decision.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF APRIL, 2021

OLGA SEWE

JUDGE