



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL APPEAL NO 14 OF 2016**

**SWALLEH C. KARIUKI.....1<sup>ST</sup> APPELLANT**

**HARON VICTOR NYONGESA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**VILOET OWISO OKUYU.....RESPONDENT**

**(An Appeal arising out of the Judgment of Hon. P.C Biwott SPM delivered on 19<sup>th</sup> May, 2016 at**

**Kitale Senior Principal Magistrate's Court Civil Case No. 184 of 2014)**

**JUDGMENT**

The Appellants were the original Defendants and the Respondent the Plaintiff in the original trial in Kitale **Senior Principal Magistrate's Court Civil Case No. 184 of 2014**. The Respondent instituted the said suit in the trial court for general and special damages, arising from injuries sustained from an accident involving motor vehicle registration number KBJ 108P Toyota Fielder driven by the 1<sup>st</sup> Appellant, and owned by the 2<sup>nd</sup> Appellant. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants. The Respondent relied, *inter-alia*, on the doctrines of *res ipsa loquitur* and vicarious liability.

During the hearing, the parties conceded on liability at the ratio of 80:20 in favour of the Respondent against the Appellants. The trial magistrate, in a judgment delivered on 19<sup>th</sup> May, 2016, apportioned liability at the ratio of 80:20 against the Appellants and awarded the Respondent general damages of Ksh.3,500,000/- and special damages amounting to Ksh.335,370/- as well as costs of the suit.

The Appellants being dissatisfied with the said judgment filed an appeal challenging the judgment of the trial magistrate. They raised several grounds of appeal challenging the decision on quantum. The Appellants were aggrieved that the trial magistrate awarded the Respondent a sum of Kshs. 335,370 as special damages which were not proved to the required standards in law. The Appellants faulted the trial magistrate for failing to subject the special damages to the agreed apportionment on liability. The Appellants faulted the trial magistrate for awarding the Respondent a sum of Kshs. 3,500 000 as general damages an amount that was excessive as to amount to an erroneous estimate of the loss or damage suffered by the Respondent. The Appellants were further aggrieved that the trial magistrate failed to consider their submissions and legal authorities. The Appellants faulted the trial magistrate for overly relying on the Respondents submissions and legal authorities which were not relevant without addressing his mind to the circumstances of the case. Finally, the Appellants were of the view that the trial magistrate's decision was plainly wrong albeit discretionary.

The Respondent on the other hand, filed a cross appeal challenging the judgment of the trial magistrate. The Respondent was aggrieved that the trial magistrate ignored the evidence adduced by the Respondent in her testimony, exhibits produced and her submissions against the Appellants by awarding general damages which were inordinately too low in the circumstances. The Respondent was further aggrieved that the trial magistrate ignored the evidence adduced in her testimony, exhibits produced and her submissions against the Appellants. The Respondent faulted the trial court for failing to grant her special damages specifically pleaded and proven. Finally, the Respondent was aggrieved that the trial magistrate failed to award loss of earnings and earning capacity when it was clear in evidence that the Respondent had sustained a permanent disability of 70% and could no longer walk.

By consent of the parties, the appeal was canvassed by way of written submissions. Both parties filed their written submissions.

The Appellants asserted that the Respondent did not spend Kshs. 327,770 for treatment expenses as pleaded and thus the award of Kshs 327,770 ought to have failed. They submitted that the Respondent during cross examination confirmed that she did not have any receipts in court to show that she spent Kshs. 327,000/= in treatment expenses. They asserted that presentation of a hospital bill by the Respondent was not enough proof that indeed the Respondent incurred the said expenses. The Appellants further submitted that the said hospital bill did not

bear a KRA stamp to proof that stamp duty was paid as required under Section 19 and 20 of the Stamp Duty Act. It was urged that this being a specific claim, the Respondent needed to prove that the requisite stamp duty was paid as required under the provisions of section 19 and 20 of the Stamp Duty Act for a court to attach any probative value on such receipts. They cited the case of **Leonard Nyongesa vs. Derrick Ngula Righa [2013] eKLR** where the court declined an award of special damages for receipts which had not been presented for stamp duty payment.

The Appellants took issue with the costs awarded for the police abstract. They maintained that the trial court blindly awarded Kshs. 500 without production of any receipts by the Respondent. The Appellants were of the view that the amount of Kshs.327 770/- awarded to the Respondent as special damages was inordinately high and unjustified, and that the same ought to be substituted by an award of Ksh.7000/= which should as well be subjected to 20% contributory negligence.

The Appellants faulted the trial magistrate for failing to subject the special damages awarded to the apportionment on liability which was pegged at 20% against the Respondent and urged the court to make a finding that special and general damages ought to have been subjected to the contributory negligence apportioned so as to arrive at a just and fair figure.

On general damages, the Appellants maintained that the trial magistrate's award of Kshs. 3,500,000 was excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent. In so submitting, they relied on the case of **Tayab vs. Kananu [1983] eKLR** whereby the court referred to the case of **West (H) and Sons Limited Vs. Shepherd 1964 AC** in which Lord Morris observed; -

***“But money cannot renew a physical frame that has been battered and shattered all that judges can do is to award sums which must be regarded as giving reasonable compensation.....by common consents, awards must be reasonable and must be assessed with moderation.”***

The Appellants asserted that the Respondent never called any treating doctor nor ascertain the actual injuries sustained as at the time and date of the accident. They contended that the medical report was prepared eight months after the accident with the doctor relying on treatment documents from Cherangany hospital which were not produced in court.

On general damages, the Appellants submitted that the amount of Kshs 3,500, 000/- awarded to the Respondent as general damages was excessive, and that the same ought to be substituted by an award of Ksh.600, 000/-. They cited the case of **Peris Mwikali Mutua vs. Peter Munyao Kimata [2008] eKLR**. In this case, the plaintiff suffered marked pain and tenderness of the left hip joint; marked swelling and severe tenderness of the left forearm and fractures of the ulna and radius (colles fractures) of the left distal forearm.

The Respondent, while opposing the Appellants appeal, referred the court to page 27 of the record of appeal and asserted that she produced the receipts for special damages being bills for medical expenses for Kshs. 327,770/=, medical re-examination receipts for Kshs. 7000 and a receipt for copy of records for Kshs.500. On special damages, the Respondent was of the view that the trial court's award should not be disturbed as the same were pleaded and proved to the required standard.

On whether the trial court erred in failing to subject the special damages to the apportionment on liability, the Respondent submitted that the court did not err by not subjecting special damages to contribution. The Respondent cited the case of **Hashim Mohammed Said & another vs. Lawrence Kibor Tuwei[2018]** where the court held:-

***“The special damages in my mind should not be subjected to the apportionment.”***

On the same note, the Respondent placed reliance in the case of **A.O Bayusuf & Sons Limited vs. Samuel Njoroge Kamau [2008] eKLR** where the court held that special damages ought not be subjected to a reduction based on the apportionment of liability.

On general damages for pain and suffering, the Respondent maintained that the injuries sustained had been confirmed by Doctor Kiamba's medical report as follows;

- a) Displaced fracture of the right ulna and radius
- b) Displaced fracture of the right femur
- c) Tear of the platella tendon of the left knee
- d) Soft tissue injuries of the left parietal region
- e) Soft tissue injuries to the chest

The Respondent maintained that the injuries were also supported by the initial treatment notes, the discharge summary, and p3 form. The Respondent asserted that she relied on the authority of **Michael Njagi Karimi vs. Gideon Ndungu Nguribu&another[2013]eKLR** where the plaintiff was awarded Kshs. 2,000,000 for injuries similar to the Respondent's herein. She maintained that the trial court's award should not be disturbed as the same was comparable to the injuries sustained.

On the Appellants' contention that the Respondent did not ascertain the actual injuries sustained by the Respondent, the Respondent maintained that the Appellants did not adduce any evidence to challenge the injuries sustained and thus the same remained uncontroverted. The Respondent relied on the case of **Patrick Kinoti Vs. Peter Mburuga G Muthamia 2014 eKLR** where the court held thus;

***“The Appellant did not call any evidence to controvert the Respondents’ injuries nor did they produce any medical report challenging the respondent’s injuries. In view of the foregoing, I find no merits in ground no 2 of the appeal and the same is dismissed.”***

On the Appellants’ contention that the trial court failed to consider the Appellants submissions and legal authorities and over relied on the Respondents submissions, the Respondent maintains that the Appellants proposed a sum of Kshs. 600,000 as general damages whereas the Respondent submitted for an award of Kshs. 5,000,000 and the court noted that the authorities relied upon by the Appellants were for less severe injuries than those sustained by the Respondent.

In the Respondent’s cross appeal, the Respondent faulted the trial court for failing to award loss of earning and earning capacity when it was clear in evidence that as a result of the accident, the plaintiff had sustained a permanent disability of 70% and could no longer walk. It was contended that in Dr. Wellington’s Kaimba’s medical report the injuries sustained by the Respondent were classified as grievous harm with 70% permanent disability. The Respondent maintains that despite having overwhelming evidence to prove that the Respondent can no longer work for gain as a business lady it failed to award the appellant loss of earning capacity. In that regard the decision of the Court of Appeal in **Edward Mwangi Waweru V. Samson Ochieng Kagunda & Another [2017] eKLR, Mumias Sugar Company Ltd Vs. Francis Wanalo [2007] eKLR and Butler Vs. Butler [1984] KLR 225** were cited.

The Appellants in opposing the Respondent’s cross appeal, asserted that the cross appellant in her plaint did not plead loss of earning capacity and neither did she plead that due to the alleged accident, she had been incapacitated and wanted to be compensated for future earnings. They cited the case of **Kenya Bus Services Limited vs. Festus S. Kibe [2004] eKLR** where the court declined to award loss of earnings which were not specifically pleaded and proved.

The Appellants further maintained that any evidence however strong that tends to be at variance with the pleadings must be disregarded.

They cited the Court of Appeal decision in **Migori HCCA No. 52 Of 2017 Daniel Otieno Migore vs. South Nyanza Sugar Company Limited [2018] eKLR, Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others (2014) eKLR and Raila Amollo Odinga & another vs. IEBC & 2 Others (2017) eKLR.**

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion whether or not to uphold the decision of the trial court. Further, the Court has jurisdiction to delve into matters of fact and law in determining the appeal. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.**)

In the present appeal and cross appeal, the issues for determination are whether the special damages awarded to the Respondent were proved to the required standards in law. Secondly, whether the award on special damages ought to be subjected to the apportionment on liability. Thirdly, whether the Respondent was entitled to an award for loss of earnings and earning capacity. Lastly, whether the amount awarded to the Respondent as general damages constituted a fair assessment for purposes of compensation.

Turning to the award of special damages, the Appellants contend that the sum of Kshs.327,770 awarded to the Respondent was not strictly proved and should be set aside as the Respondent did not produce any receipts in payment of medical expenses. It is further contended that on cross examination, the Respondent confirmed that she did not have the receipts in support of the medical expenses.

In regard to special damages the law is quite clear on the head of damages called special **damages**. Special Damages must be both **pleaded and proved**, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

***“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”***

A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd.**)

This court has carefully perused and evaluated the evidence presented in support of special damages by the Respondent. It emerges that, in cross examination, the Respondent conceded to not having receipts in support of the medical expenses clearly indicating that her bill at the hospital was paid but the receipts were at home.

As is readily obvious, the documents presented in support of the Respondent’s medical expenses are bills and not receipts as our case law requires. I thus find that the award of special damages in the sum of Kshs. 327,770 was erroneous and the same is set aside and substituted with an award of Kshs. 7,500 which was the only amount proved by evidence in accordance with the standards required in law.

On the Appellants contention that the court should not attach any probative value to receipts without revenue stamps affixed on them, the court is of the view that it is the duty of the receiver of monies who has a duty to affix revenue stamps and not the payee who cannot be

penalized for the omissions of the receiver.(See *Benjamin Muela Kimono V Daniel Kipkirong Tarus & Another, (2015) eKLR* and *Benedetta Wanjiku Kimani V Chanaw Cheboi & Another, HCCC No 373 of 2008 and Irene Ngombo Mshingo V Miriam Kadogo, (2000)KLR*)

*In the instant appeal, this court is satisfied that the receipts for medical report and copy of records are admissible as they bear stamps of the doctor and institutions that issued them.*

The Appellant further asserts that, under this head liability had been agreed upon the parties by consent. The Respondent conceded 20% contribution so it follows that both the general damages and special damages should be subjected to 20% contributory negligence. The trial magistrate is faulted as having erred in law and fact in disregarding this fact and not subjecting liability to 20% contributory negligence as agreed upon by parties. The court is thus urged to interfere and subject special damages to 20% contributory negligence. The special damages due to their specific nature and standards required to prove them, in my view should not be subjected to the apportionment. (*See A.O BAYUSUF & SONS LIMITED V. SAMUEL NJOROGI KAMAU[2008]eKLR*)

Turning to loss of income and/or future earnings, the Respondent in her cross appeal faulted the trial court for failing to award damages under this head.

Loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages, whereas loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. See *Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR.*

That being the case, I note from the record and more specifically the pleadings, that the Respondent never pleaded loss of income and/or future earnings. In *Douglas Kalafa Ombeva v David Ngama [2013] eKLR*, the Court of Appeal held that:

***“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”***

In the absence of evidence that the Respondent lost income during this period or any period after the accident occurred, this court is of the view that the Respondent never lost any income as a result of the accident and this claim must fail for want of proof.

On loss of earning capacity, the Respondent did not lead any evidence on the nature of business she was engaged in and how much money she was making from the business per month. She never led evidence on how the injuries she sustained from the subject accident had affected her business.

The Court of Appeal in *S J v Francesco Di Nello & another [2015] eKLR* held that:

***“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.”***

In the Respondent’s evidence and submissions, she only asserted that she cannot work. This claim must also fail for want of proof.

On general damages, the trial court awarded the Respondent Kshs. 3,500,000/-. The trial court relied on authorities cited by the Respondent in the trial court. The Appellants were of the view that the amount awarded as general damages were excessive, and that the same ought to be substituted by an award of Ksh.600,000/- The Respondent on the other hand, argued that the trial court was not misdirected in assessment of the damages and that the award should not therefore be disturbed.

In *Butt V Khan (1977) 1 KAR* the Court of Appeal held as follows;

***“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”***

The Respondent pleaded the following injuries which were corroborated by Dr. Wellington Kaimba’s medical report.

- a) Displaced fracture of the right ulna and radius
- b) Displaced fracture of the right femur
- c) Tear of the platella tendon of the left knee
- d) Soft tissue injuries of the left parietal region
- e) Soft tissue injuries to the chest

This court has considered the authorities cited by the Appellants as well as the authorities relied on by the trial court. The injuries in the

authorities cited by the Respondent in the trial court were more severe and not comparable to the injuries that she sustained in this accident.

She relied on **Michael Njagi Karimi vs. Gideon Ndungu Nguribu & another**[2013]eKLR where the plaintiff sustained the following injuries: bruises, swelling, and tenderness of the right arm and forearm and a displaced fracture of the right humerus; deformity and swelling of the right forearm and fracture of the right radius and ulna with displacement; injury to the right lower limb involving the right leg which was tender, swollen and deformed with a fracture of the right tibia and fibular; swelling and deformity of the left thigh with apparent shortening with an x-ray revealing a segmental fracture of the left femur with marked displacement. The plaintiff in this case had also undergone multiple surgeries as follows; surgery on the right tibia, to plate and correct shortening and deformity of the bone; surgery on his left femur to remove K-nail; surgery on his right tibia to remove the plate; surgery on right humerus to remove the plates and surgery.

The authorities relied upon by the Appellants on the other hand were held to be on the lower side. The Appellants had cited **Machakos HCCA No. 280 of 2017 Peris Mwikali Mutua Vs. Peter Makau Kimita** and **Nairobi Civil Appeal No 203 Of 2001, Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko** where the plaintiffs on appeal had been awarded Kshs. 450,000 and Kshs. 300,000 respectively.

It has been stated and restated from time to time that in assessment of damages, the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases. This court will, therefore, in determining this appeal and cross appeal, establish whether the trial court followed this principle and if so, whether this court should interfere with the award of general damages.

The Court of Appeal in **Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997** held that:

***“The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”***

The Appellants have urged this court to reduce the award of general damages on account that the Respondent was awarded damages that are so excessive as to be an erroneous estimate of the injuries suffered.

**In Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, Kneller J.A. stated:**

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970]E.A. 414, 418, 419. This court follows the same principles.”***

Having considered the pleadings as filed on injuries before the trial court, reassessed the evidence as adduced in support of the pleaded injuries and submissions together with judicial authorities cited by both parties’ counsel in their respective submissions on appeal, the trial court no doubt awarded inordinately excessive damages and this court is persuaded that there is merit and justification in interfering with the award.

In this case, the trial magistrate did not consider the fact that comparable injuries should be compensated by similar awards of general damages. The two cases referred to by the trial court addressed situations involving multiple injuries including severe fractures whereas in the present case, the Respondent sustained injuries which were less severe.

Accordingly, I allow this appeal on quantum, set aside the award of Kshs. 3,500,000/= general damages awarded to the Plaintiff/Respondent by the trial court and substitute it with an award of Kshs. 1,500,000/= less 20% contribution leaving a balance of Kshs. 1200,000/= plus special damages as proved in the sum of Kshs. 7,500. Interest shall be paid on the awarded sum from the date of the judgment by the trial court.

Costs are in the discretion of the court and in any event, to a party who is successful. However, in this case, I order that each party do bear their own costs as the appeal was only on quantum and the fact that the Respondent’s costs as awarded in the trial court are considerably reduced in view of the reduction of the general damages by half in this appeal.

Orders accordingly.

**DATED AND SIGNED AT KITALE THIS 27TH DAY OF JULY, 2021.**

**L. KIMARU**

**JUDGE**