REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 10 OF 2014

KEVIN JOHN BARETT..... APPELLANT

VERSUS

SLH (Minor suing through the father

And next friend CH).....RESPONDENT

(Being an appeal from the judgement and decree of the Honorable P.Ngare Gesora (Mr.) SPM in Machakos CMCC 1271 of 2010 delivered on 17.1.2014)

BETWEEN

SLH (Minor suing through the father

and next friend CH).....PLAINTIFF

VERSUS

KEVIN JOHN BARETT.....DEFENDANT

JUDGEMENT

1. According plaint filed in the subordinate court and amended on 26th April, 2012, the respondent sued on behalf of his daughter who was a passenger in a Motor Vehicle registration number KAH 444Y registered in the names of the appellant. According to the plaint, on 20th June, 2010 while travelling in the said vehicle along Loitoktok-Emali Road, the appellant's vehicle was involved in an accident, lost control and overturned and as a result the respondent suffered damage and loss. The respondent pleaded particulars of negligence and further claimed future medical expenses in the sum of Kshs 1, 500,000/-. He therefore sought special and general damages, future medical expenses and interest and costs of the suit.

2. In his defence, the appellant denied the accident as well as the negligence. He denied the injuries and loss and future medical expenses and pleaded that the accident was caused by inevitable accident and prayed that the suit be dismissed with costs.

3. After hearing the matter, the learned magistrate found that the accident occurred and that the appellant admitted accident by pleading guilty to a charge of careless driving and that the appellant admitted overtaking a lorry thereby hitting it on the rear resulting in the respondent being thrown out of the suit vehicle. This, it was found established negligence and therefore found the appellant 100% liable. He was awarded General Damages of Kshs 2,500,000/-; future medical expenses of Kshs 1,000,000/- and special damages of Kshs 61,800/- together with costs. It was this decision that provoked the instant appeal.

4. The evidence in the trial court was that PW1 was **SLH** was travelling in the suit vehicle when there was an accident and she found herself in hospital with a cracked skull, dislocation of the right shoulder and broken right eye socket. Pw2, **CH,** PW1's father was in another vehicle when upon reaching Emali he found that the accident had occurred and PW1 was injured. He then chartered a plane that took PW1 to Nairobi Hospital where she received treatment. According to him, PW1 had injuries on her collar bone and **Dr Gathua**, **Dr Wanyoike** and **Dr Amuganda** prepared reports. It was his testimony that he made a report to the police and was issued with an abstract. He further testified that the appellant was charged in court and he pleaded guilty as evidenced by the proceedings in traffic case 926 of 2010 produced in court. He told court that PW1 needs further treatment at a cost of Kshs 1,500,000/-. On cross examination he testified that the cost of future medical

was estimated at Kshs 500,000/- and amended to Kshs 1,500,000/-.

5. Pw3, **Dr Amugada,** testified that PW1 suffered head Injury, temporary loss of consciousness, laceration on the right side of the head-front parietal with haematoma and peeled off lap, depressed fracture on the right-fronto orbital region with fracture of the floor of the right orbit, Damage to 3 front teeth-upper central incisors and left lateral incisor, partial dislocation of the sterno-clavicular joint with multiple bruises and cuts on the right shoulder and forearm, soft tissue injury to left shoulder, elbow and forearm, deep cut on the right side iliac region and multiple bruises on the lower limbs

6. He told court that his estimate of Kshs 500,000/- for future medical expenses was based on the fact that he was a physician however **Dr Githua** who is a surgeon estimated the same in the sum of Kshs 1,500,000/-. On cross examination he told court that he examined the PW1 3 months after the accident.

7. At the close of the plaintiff's the defence closed its case without calling any evidence.

8. In this appeal in which the appellant contents both the findings on liability and quantum, it was submitted that the conviction of the appellant in the traffic case did not mean that he was 100% liable and this submission was based on the case of **Philip Keipto Chemwolo & Another vs. Augustine** Kubende **(1982-88) 1 KAR.** On the issue of quantum, counsel submitted that the amount of Kshs 700,000/- ought to have been awarded for pain and suffering and cited the case of **Telkom Orange Kenya Limited vs. ISO (2018) eKLR**. For future medical expenses, counsel submitted that Kshs 500,000/- be awarded as this was what was proven.

9. On behalf of the Respondent, it was submitted that that the Appellant did not produce any evidence to counter the nature of injuries of the Respondent and the Medical documents and reports produced therefore the respondent's evidence remains unrebutted and uncontroverted. Reliance was placed on the case of **Duncan Kimathi Karagania vs Ngugi David and Anor Civil Case No 75 of 2012.**

10. According to the Respondent, in the above case, the plaintiff suffered multiple fractures and was left with scars in the injured areas and the Learned Judge awarded Kshs. 4,000,000 as general damages. It was therefore submitted that the Learned Magistrate did not err in awarding costs of Kshs 1,000,000 as costs for future medical costs for it was not disputed that the Respondent sustained injuries that would require surgeries and follow up medical attention. According to the Respondent the Medical report was part of the list of documents that formed part of the Respondent's bundle of documents presented before the Trial Court. It was submitted that the Appellant did not call any expert witness to give evidence contrary to what had been presented by the Respondent.

11. On the issue of the evidence of the traffic case being relied on, it was submitted that there was evidence that the Appellant was arraigned before the Senior Resident Magistrate at Kajiado in Traffic Case No 926 of 2010 charged with the offence of careless driving as noted from the Certified proceedings produced as an exhibit before the Trial court that the Appellant admitted to the said offence. In this regard the Respondent relied on section 47A of the ***Evidence Act*** **CAP 80 Laws of Kenya** and the case of **Patrick Kamuya Alias Gachau Patrick versus Asaph Gatundu Civil Appeal No 109 of 2012.**

12. It was counsel's strong argument that the judgement of the traffic court was not appealed against. Further reliance was placed on the case of **Steve Mwasya versus Rosemary Mwasya Civil Case No. 221 of 2011.**

13. The Court therefore urged to dismiss with costs as the same lacks merit.

Determination

14. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

15. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

16. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration.**

Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

17. Nevertheless, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

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

19. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

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

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

20. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

21. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

22. In this case, from the traffic proceedings, it would seem that the Respondent's vehicle hit another vehicle from the rear. In **Securicor Kenya Limited & Another vs. Kipchumba Changwony & 2 Others Nakuru HCCA No. 7 of 2005**, it was held that the blame is greater on a driver who hits the vehicle from the rear and that in the absence of any complaint from the Respondent as to how the accident occurred he cannot escape liability.

23. The Respondent contended that the mere fact that there was a conviction arising from the said accident ought not to be taken as evidence that he was liable. It is true that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

24. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigating officer is not necessarily fatal in accident claims. In **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR** it was held:

"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

25. As regards the relevancy of a conviction of a traffic offence to a civil claim in respect of negligence, section 47A of the ***Evidence Act*** states that:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

26. In relation to that section, it was held by the Court of Appeal in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** in which **Platt, JA** opined that:

"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."

27. According to **Apaloo, JA** (as he then was) in the same case:

"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."

28. Similarly, in **Robinson vs. Oluoch [1971] EA 376**, it was held that:

"The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

29. What I understand the Court of Appeal to have been stating is that a defendant cannot be barred from putting forward a defence simply because of the fact of a conviction in a traffic case since in appropriate circumstances a defence of contributory negligence is always available to the defence. It is however my view that where the defence has been given an opportunity to offer evidence but fails to do so, as was held by **Githinji, J** (as he then was) in **Ernest Mwara Situma vs. Aziz Bin Ali Ciragdin Mombasa HCCC No. 510 of 1989:**

"Conviction in a traffic case is conclusive proof that the defendant is guilty of negligence under section 47A of the Evidence Act."

30. In this case there is simply no evidence on record on the basis of which can find that any other person was negligent or contributed to the accident apart from the Appellant.

31. The appellant has also taken issue with the fact that the police abstract was not produced by the author. I associate myself with **Sergon, J** in the case of **Steve Mwasya versus Rosemary Mwasya Civil Case No 221 of 2011** where he remarked that:

'Under the provisions of the Evidence Act, the maker of the documents is required to produce as exhibits in evidence these documents. However, the law is not cast in stone. The court is given a wide discretion to waive that requirement in certain circumstances and allow another person other than the maker to produce those documents…''

32. The Court of Appeal dealt with a similar issue in **Wellington Nganga Muthiora vs. Akamba Public Road Services Limited & Another [2010] 2 KLR 39** where it held that:

"The appellant produced a police abstract which stated that the first respondent was the owner of the vehicle and that was prima facie evidence. The first respondent did not challenge the production of the police abstract by the appellant on the basis either that he was not the maker of it or that the contents were not admissible or were not correct. The first respondent let it be produced without raising a finger. In cross-examination by the learned Counsel for the first respondent, the allegation in the police abstract that the first respondent was the owner was not challenged, though the other contents of the abstract such as whether indeed the appellant was a passenger in the same bus were challenged by clear questions as to whether the appellant's name was in the passenger manifest and whether he had a ticket as evidence that he was in the passenger bus. In such a situation where the police abstract's contents pertaining to ownership of the vehicle was not challenged, it remained prima facie evidence and when the respondents offered no evidence in their defence, such prima facie evidence was not rebutted and it remained valid, unrebutted evidence before the court."

33. It is therefore too late in the day to raise the issue of admissibility of the said abstract. By attempting to do so the Appellant is seeking to close the stable after the horses have bolted.

34. In the foregoing premises, there is no basis upon which I can interfere with the learned trial magistrates' finding on liability.

35. As regards the quantum, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

36. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

37. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

38. I have considered the award made and the authorities relied upon. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

39. In my view the award made by the learned trial magistrate were well within the range of awards made in similar cases. Even if this court had been of the opinion that it would have awarded a different figure, that is not a ground for interfering with the award.

40. As regards the award for future medical expenses, an award for future medical expenses must stand on its own as a specific prayer to be specifically established. **Ringera, J** (as he then was) in **Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002** held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993,** held that cost of future medical operation is special damages, which must be pleaded. See also **Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246.** Being special damages, it is trite that such damages must be pleaded and strictly proved. The plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give me these damages". They have to prove it. See **Shabani vs. Nairobi City Council & Another Civil Appeal No. 52 of 1984; Bonham Carter vs. Hyde Park Hotel Limited (1948) 64 TLR 117;** and **Ouma vs. NCC [1976] KLR 297.**

41. In this case the medical report that was produced by PW3 as exhibit 8 was estimated the future medical expenses at Kshs 500,000.00. Though reference was made to the opinion of **Prof. Gathua** whose estimate was 1.5 million the report of **Prof. Gathua** which though formed part of the Respondent's bundle of documents was never formally produced as an exhibit. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

> **"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"**
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> **17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**
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> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**
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> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**
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> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.**
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> **21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**
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> **22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.**
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> **23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.**
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> **24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to**

produce the documents marked for identification……."

42. In **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** the Court of Appeal held:

> ***"that the mere marking of a document for identification does not dispense with the formal prove. The document has to be produced and the court has to admit the same in evidence and thus it forms part of the judicial record of the case and constitutes evidence."***

43. In this case the report of **Prof Gathua** was not even marked for identification. It could not therefore be relied upon by the Respondent as it was not formally tendered and subjected to cross-examination. In the premises I agree that the only proof of future medical expenses was the report of PW3 which estimated the same at Kshs 500,000.00. That was the award that ought to have been made under that head.

44. In the premises I allow the appeal against the award of future medical expenses, set aside the award of Kshs 1,000,000.00 thereunder and substitute therefor an award of Kshs 500,000.00. Save for that this appeal fails.

45. Each party will bear own costs of this appeal.

46. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 18th December, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Bitok for Mr Wambwa for the Appellant

Miss Kafafa for Mr Solonka for the Respondent

CA Geoffrey