



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL 105 OF 2008**

*(Being an appeal from the judgment and decree of the E. Tanui, RM in Nakuru CMCC No. 465 of 2005 dated and delivered on 30/5/08)*

**S.D.V. TRANSAMI K. LTD.....APPELLANT**

**VERSUS**

**SCHOLASTIC NYAMBURA.....RESPONDENT**

**JUDGMENT**

This is an appeal from the judgment of Hon. E. Tanui, Resident Magistrate, delivered on 30/5/2009 in Nakuru CMC No.465/05. The trial court made an award of Kshs.360,000/- in damages and Kshs.94,205/-. The issue of liability was settled when the parties filed a consent dated 12/11/07 whereby judgment was entered in favour of the respondent against the appellant at 70%. The trial court went ahead to assess the damages.

The appellant is aggrieved by the award on the following grounds:-

1. **That the award of Kshs.360,000/- is excessive and inordinately high;**
2. **That the trial court acted on wrong principles of law and fact and took into account irrelevant considerations in assessing damages;**
3. **That the trial court applied the wrong principles of law and facts, took into account irrelevant considerations in assessing the special damages**
4. **That the trial court ignored the appellant's submissions on damages;**

**5. That the trial court erred in considering receipts which did not bear stamps as required by the Stamp Duty Act.**

The appellant therefore prays that the court do set aside or quash the award of both general and special damages, re-assess and reduce the damages.

Mr. Matiri urged the appeal on behalf of the appellant. Mrs Mukira opposed the appeal on behalf of the respondent. Mr. Matiri submitted that the award in damages was excessive. Ms Mukira on the other hand maintains that the award was fair in the circumstances. The respondent was examined by Dr. Kiamba who prepared a report dated 20/1/05. He found that the respondent had sustained the following injuries:-

- 1. Compound fracture of the right tibia and fibula;**
- 2. Deep cut wound on the left leg;**
- 3. Multiple cut wounds on the right leg.**

Upon examination he found the wound had healed well, there was a permanent incision scar 27 cm long, several scars and the right leg was swollen and tender. The respondent was still suffering from residual pain in the right ankle joint. The doctor classified the injuries as grievous harm. Mr. Matiri referred to comparable authorities of **Joseph Mutua Kinuthai V. David Kamande Kunuthai HCC 621/98** where the plaintiff sustained compound fracture of right tibia and fibula, fracture of femur and midshift, fracture of left tibia and fibula bones and laceration wounds and the court awarded Kshs.120,000/- in general damages. In **Martha Njeri V. Josephat Wanyoike Wainaina & Another HCC 5964/1990**, the plaintiff suffered a compound fracture of the upper and lower end of right tibia and fibula and soft tissue injuries, the court made an award of Kshs.150,000/- in 2001. Although the above awards were made by the same court, in the case of Kinuthia, the plaintiff suffered much more serious injuries yet the award which was made a year after that in Njeri's case was less. Mr. Matiri submitted that an award of Kshs.150,000/- be made. On the other hand, Ms Mukira relied on the decision in **Charles Odhiambo V. Omar Transporters Ltd & Others HCC 155/98** where the plaintiff suffered a fracture of the left lower leg, tibia and fibula and an award of Kshs.100,000/- was made in 2001

The principles upon which an appellate court can interfere with the award of general damages made by the trial court have been laid down by the courts. In **Peter Kahungu and Kentmere Flora Ltd V Sarah Norah Ongaro HCC Ap. 676/00**, the court relied on the Court of Appeal decision in **Kivati v Coastal Bottlers Ltd CA 69/1984** where the court said:-

**“The Court of Appeal should only disturb an award of damages when the trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”**

I have considered the submissions by both counsel on this issue. The appellant has not pointed to any specific factor that the trial court failed to take into account or what the court took into account that it should not have. I, however, considered the decisions that were cited by consent. All of the decisions were made about 10 years ago. I have already pointed out the disparity in two of the decisions made by the same court. They were cited by the appellant. In the lower court, the respondent had relied on the case of **Mwangi Thuita Wamenju V Ndai Kawoya HCC 4813/1987** where the plaintiff suffered a compound fracture of the left tibia and fibula and laceration of the right leg, was admitted for 6 months, leg shortened by 2cm and developed osteoarthritis in the lower leg, the court made an award of Kshs.350,000/- as general damages in 1991. This case can be distinguished from this one in that the plaintiff was admitted for long, developed osteoarthritis and the leg was shortened as a result of the injuries which the plaintiff herein did not suffer. Taking into account all these authorities, the fact that the decisions relied on were made about 10 years ago and the incidence of inflation, I find that the award was on the higher side. Instead I will make an award of Kshs.250,000/- general damages.

In the plaint, the respondent pleaded special damages of Kshs.94,205.90. It is the appellant's contention

that the receipts were not affixed with stamps as required by the **Stamp Duty Act. Section 19(1)** of the **Stamp Duty Act** prohibits the receiving in evidence in any proceedings, any instrument chargeable with stamp duty without the stamp. Such instrument must be stamped. Under **Section 19(3)(a)** and **(b)**, one wishing to produce such document can be given reasonable opportunity to apply to the collector of stamp duty for leave under **Section 20**, to obtain a certificate under **Section 21(1)**. In this case, Mrs Mukira urged that the documents had been admitted by consent and not challenged. She relied on the decision of **Timsales Ltd v. Moses Mburu CA 208/04** where on appeal, the appellant challenged the production of the medical report which had been admitted in evidence by consent. The court held that the appellant should have insisted on attendance by the makers at the time of production of the medical report. Whereas parties can waive the production of medical reports by the makers, the requirements of the Stamp Duty Act are mandatory and should have been complied with at the time. At the time of production of the receipt, the court had discretion to allow the respondent time to obtain the certificate from the stamp collector in terms of **Section 19(3)(b)**. The court was not moved to exercise its discretion to enable the plaintiff obtain a certificate from the stamp collector.

In the end, I set aside the award on general damages and substitute it with an award of Kshs.250,000/-. As for special damages the receipts which bear stamps in accordance with the **Stamp Duty Act** total Kshs.49,360/-. Those are the proved special damages. In the end the respondent will have judgment as follows:-

General damages = 250,000.00

Special damages = 49,360.00

Total = 299,360.00, less 30% contribution

= 209,552.00

The respondent will have judgment for Kshs.209,552/- as general and special damages. Costs of the appeal to the appellant.

**DATED and DELIVERED this 25<sup>th</sup> day of May, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Maijah for the appellant

Mrs Mukira for the respondent

Kennedy – Court Clerk