Nyambok v Shikuku (Civil Appeal E009 of 2025)
[2025] KEHC 10572 (KLR) (21 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E009 OF 2025

A MABEYA, J

JULY 21, 2025

BETWEEN

GABRIEL OKUKU NYAMBOK ..... APPELLANT

AND

GODFREY OUMA SHIKUKU ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. G.C. Serem RM delivered on the 4/07/2024 in the Ksm SCCC No. E005 of 2024)

JUDGMENT

1. The respondent filed the primary suit before the trial court vide a statement of claim dated 20/12/2023 seeking general and special damages of Kshs. 246,550/- for injuries sustained following a road traffic accident.

2. The appellant entered appearance and filed a response dated 15/05/2024 denying the accident. He contended that if the accident occurred, the respondent and rider of the motorcycle contributed to the same thus claimed that the suit be dismissed with costs.

3. The matter proceeded to trial and by a judgment delivered on 4/07/2024, the trial court decreed that: -

    a. Liability – 100% as against the respondent

    b. General damages - Kshs. 350,000/-

    c. Special damages – Kshs. 6,550/-

    d. Costs of the suit and interest from the date of judgment.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 17/11/2024 and raised five [5] grounds of appeal as follows: -

a. That the learned trial magistrate erred in law in awarding the respondent general damages in the sum of Kshs. 350,000/- an amount which was excessive and not commensurate to the injuries sustained at the accident.

b. That the learned trial magistrate erred in law and fact by holding that the claimant sustained a dislocation during the accident.

c. That the learned trial magistrate erred in law by awarding the respondent special damages of Kshs. 6,550/- which were not proved to the required standard without proof of payment.

d. That the learned trial magistrate erred in law over relying on the respondent's evidence most of which was speculative in nature thereby reaching an entirely erroneous finding.

e. That the learned trial magistrate erred in law by overly relying on the respondent''s submissions and legal authorities which were not relevant and without addressing his mind to the evidence adduced hence occasioning a miscarriage of justice.

5. The appeal was disposed of by written submissions that were highlighted on the 26/5/2025. The appellant submitted that the medical records relied on by the respondent only confirmed soft tissue injuries thus an award of Kshs. 100,000 would have been sufficient. Reliance was placed on the case of *Adembesa & Another v Gweno [Civil Appeal E192 OF 2023*] [2024] KEHC 5379 [KLR] [17 May 2024] where the court found that there was no evidence of a fracture produced by the respondent thus reduced the award from Kshs. 1,200,000 to Kshs. 120,000.

6. That the receipts produced in support of the special damages did not bear any revenue stamp as required by the *Stamp Duty Act* and the same ought not to be allowed.

7. On the other hand, the respondent submitted that it was not true that he only suffered soft tissue injuries as he proved his injuries through the various medical reports that showed that he sustained a tender swollen dislocated joint and that he was currently on a good cast.

8. That the issue of the receipts lacking stamp duty stamps was not raised before the trial court and that in any case the case of Juliet Kemunto Ondati v Gladys Mwende [2021] eKLR the court erred held that the trial court erred in rejecting similar receipts.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial afresh and come to its own independent findings and conclusions. See Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. Before the trial court, the respondent testified as CW1. He told the court that on the material day he was riding his motor cycle reg. no. KMGH 444W with a pillion passenger along Kisumu-Busia road heading to Kisumu. At Chulaimbo area, he stopped at a Police Check Point for inspection. After inspection, he was waived off to continue with his journey. There were other vehicles from the direction of Kisumu which were stationary waiting to be checked and then allowed to proceed with their respective journeys.

11. When he crossed over the Spike Str ipes, the appellant's motor vehicle reg. no. KBS 314Swas so negligently driven that it attempted to overtake the aforesaid stationary motor vehicles, being driven on the wrong side of the road that it knocked him off and the passenger off the road. He got injured and was rushed to Chulaimbo County hospital. He narrated the injuries that he sustained and that he was on crutches for 3 months. He was not able to attend to his work at Jossi Construction where he was earning between Kshs. 1,800/- and Kshs. 2,000/- per month.

12. In cross-examination, he admitted that no charges had been brought against the driver of the subject motor vehicle. That he had no evidence to show that he was employed with company he had claimed he was working for. That he had no head injuries.

13. That was the only evidence presented before the trial court. The parties closed their respective cases and then proceeded to make submissions. It is on that evidence that the court made its findings in the impugned judgment.

14. The Court has considered the record in its totality. The five grounds of appeal may be summarized into 3 as follows: -

    a. That the trial court erred in finding for the respondent who had failed to prove his case to the required standard.

    b. That the trial court erred in awarding the respondent Kshs.350,000/- which was excessive in the circumstances of the case.

    c. That the trial court erred in awarding special damages of Kshs.6,550/- which were not proved to the required standard for non-payment.

15. On the first ground of appeal, it is trite law that he who alleges must prove. 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."

16. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, 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 case 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."

17. Accordingly, it was the respondent's duty to produce evidence that showed that an accident occurred from which he sustained the alleged injuries. From the record, the respondent pleaded that he sustained the following injuries;

    i. Deep cut wound on the frontal area

    ii. Multiple lacerations/bruises on the facial area

    iii. Swollen tender right thumb

    iv. Tender and swollen dislocated joint on the ankle [calcaneal talus dislocation right]

    v. Multiple bruises around the ankle joint

18. In essence, the respondent sustained soft tissue injuries and a dislocated right ankle joint. The said injuries were further confirmed by the P3 form, treatment notes from Chulaimbo County Hospital and the medical report from St. Peter's Orthopaedic Clinic. This evidence was not challenged by any other alternative evidence by the appellant.

19. In Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR, the court stated as follows: -

> " In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."

20. In Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi [Milimani] HCCC No., 834 of 2002, Lessit, J [as she was then] citing the case of Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998 observed that: -

> " Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

21. In Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi [Milimani] HCCS No 1243 of 2001, the court, citing the same decision, stated that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

22. Similarly, in Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi [Milimani] HCCC No 165 B of 2000, Mbaluto, J held that where no witness is called on behalf of a defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.

23. I am persuaded that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding that the respondent had proved the injuries sustained on a balance of probabilities. The appellant having failed to call any evidence in aid of its defence, the respondent's evidence was uncontroverted and unchallenged. The same was taken to be the true state of facts and the case was proved to the required standard.

24. The second ground was that the damages of Kshs.350,000/- awarded were excessive. It is trite that an appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted in an injustice [see Mbogo & another v Shah [1968] EA 93, and Mkube v Nyamuro 1983 KLR 403.]

25. In *Thuo & another v Nanzala [Civil Appeal E075 of 2022]* [2024] KEHC 2978 [KLR] [21 March 2024] [Judgment], the Court quoted the Court of Appeal in Loice Wanjiku Kagunda v Julius Gachau Mwangi *CA 142/2003* [unreported] wherein it stated that: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles [see Manga V Musila [1984] KLR 257]."

26. In the present case, the injuries were proved through the P3 Form dated 15/8/2023, Medical Notes from the Chulaimbo County Hospital and the Medical Report from St. Peter's Orthopaedic Clinic dated 18/082023. These were soft tissue injuries and a tender swollen dislocated joint.

27. In Thuo & another v Nanzala [supra], where the respondent sustained injury of dislocation and other soft tissue injuries, the court set aside the sum of Kshs 600,000/- awarded as general damages and substituted the same with Kshs 400,000/- as general damages.

28. In Richard Gituku Gakinya v Anthony Kibirii Waithaka [2021] eKLR, the respondent sustained deep cut wounds on the supra-obital region, right ankle joint dislocation and soft tissue injuries and was awarded Kshs. 400,000/-. However, the High Court set aside the award and substituted it with an award of Kshs. 300,000/-.

29. Going through the aforementioned decisions and considering inflation, I cannot fault the trial adjudicator for finding that Kshs. 350,000/- was sufficient to compensate the respondent in the circumstances. This sum falls within the range of what could have been awarded

30. As regards special damages, the basic principle that guides the award of special damages is that they must be specifically be pleaded and strictly proved. In Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR, the Court of Appeal stated: -

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

31. The appellant is aggrieved by the trial court's award for special damages because receipts relied on by the respondent for special damages were inadmissible because no stamp duty had been paid for them. The relevant law on this issue is section 19 of the *Stamp Duty Act* which provides: -

> " [1] Subject to the provisions of subsection [3] of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-
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> a. in criminal proceedings; and
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> b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.
>
> [2] ...
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> [3] Upon the production to any court [other than a criminal court], arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—
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> ...
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> [c] in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection [5], and the duty and

penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence."

32. In Paul N.Njoroge v Abdul Sabuni Sabonyo [2015]eKLR, the Court of Appeal held that: -

> " 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 v 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. v Bhaloo [1958] EA 762 at page 763 where Law J., [as he then was] quoted with approval the holding in Bagahat Ram v 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".
>
> 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.
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> 22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer, Thetu Theuri Gitonga [PW7-sic], and the consultant physiotherapist, Paul John Mwangi [PW7], both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs. 38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof."

33. The decision by the Court of Appeal is binding on this court as well as the trial court. Consequently, I find that the trial court did not err in considering the receipts without the stamp duty stamps.

34. Consequently, it is clear that this appeal lacks merit. Accordingly, the same is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2025.

A. MABEYA, FCI Arb.

JUDGE