**Nkuru v Mucee (Suing as guardian and next friend of Newton Nyaga) (Civil Appeal E017 of 2023) [2024] KEHC 13852 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13852 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT CHUKA**

**CIVIL APPEAL E017 OF 2023**

**LW GITARI, J**

**NOVEMBER 6, 2024**

**BETWEEN**

**MICHAEL KIMANTHI NKURU ..... APPELLANT**

**AND**

**MARY KARIMI MUCEE (SUING AS GUARDIAN AND NEXT FRIEND OF NEWTON NYAGA) ..... RESPONDENT**

**JUDGMENT**

1. The respondent filed a suit vide a plaint dated 4th March, 2021 against the appellant seeking for a judgement against the Appellant seeking for general damages for pain and suffering, special damages as pleaded plus interest and cost of the suit and interest thereon.

2. The respondent pleaded that at all material times relevant to the suit the 1st and 2nd defendants have always been the registered and/or beneficial owners of m/vehicle registration no. KCL 283 E Nissan Tilda. That on or about 27th September 2020 the respondent was lawfully travelling as a pillion passenger abode m/cycle registration no. KMFA 842 Y ridden along Tunyai-Kathwana road when the Appellant so negligently drove, managed and/or controlled m/vehicle registration KCL 283 E Nissan Tilda causing it to veer off its rightful lane and crush into m/vehicle the respondent was riding in occasioning him serious injuries.

3. The respondent enumerated particulars of negligence on the part of the Appellant as driving Motor vehicle KCL 283E Nissan Tilda at an excessive and dangerous speed in the circumstances, recklessly driving the suit motor vehicle in total disregard of other road users, negligently failing to brake, slow down, swerve or otherwise control the said motor vehicle to avoid the accident, negligently violating the traffic rules and the Highway Code of Conduct and causing the accident and driving without due care, prudence, skill and competence of a driver.

4. The respondent avers that in the alternative the said motor vehicle must have been defective thus incapable of proper control and management. That the respondent relies on the doctrine of res ipsa loquitor and as a result of the aforementioned the respondent sustained serious injuries which have caused him untold pain and suffering.

5. The respondent enumerated particulars of injury as a deep laceration of the upper lip through the philtrum slicing it into two, right 2nd upper incisor fracture with several loose adjacent teeth, blunt chest and abdominal trauma(no visceralo injuries)de gloving injury on the antero medical aspect of the right big toe and multiple abrasion and laceration injuries on the right iliac fossa, dorsum of both hands, elbow region and forehead.

6. The respondent particularized of special damages as medical expenses kshs 1050, medical report kshs 5,000 demand notice kshs 5,000 and a copy of records kshs 550/=.

7. The Appellant denied being in breach of the insurance contract or clause thereof which the respondent is called to specifically demonstrate the purported breach as the same is neither pleaded nor demonstrated in subsequent documents in support of the respondent's case.

8. The Appellant filed his defence dated 29th March, 2022 wherein he admitted that they were the registered and or beneficial owners of motor-vehicle KCL 283E.The defendants denied that the Appellant negligently drove, managed and/or controlled the motor vehicle registration number KCL 283E causing it to veer off its rightful lane and crush into the motorcycle KMFA 842Y occasioning the respondent injuries. The Appellant put the respondent to strict proof.

9. The Appellant denied the particulars of negligence as pleaded and put the respondent to strict proof. The Appellant denied the doctrine of Res ipsa loquitor is applicable in the instant case.

10. The Appellant pleaded in the alternative and without prejudice to paragraph 3,4 and 5 of the defence that if the respondent was involved in an accident as alleged which is denied the said accident was wholly caused and/or substantially contributed to by the respondent.

11. The Appellant enumerated particulars of negligence of the respondent as riding on an overloaded motorcycle, failure to wear a helmet and protective clothing while riding on a motorcycle, failing to take reasonable care of his own safety, riding on a motor cycle without any regard to traffic rules, taking no steps to avoid the accident and causing the accident.

12. The Appellant pleaded that if any accident occurred the same was substantially caused by the rider of motor cycle registration number KMFA 842Y who so negligently controlled the said motorcycle leading to the accident in question. That the appellants intend to take out third-party proceedings against the owner of the motor cycle for indemnity/contribution for the loss occasioned on the material day.

13. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:

    i. General damages of kshs.800,000 subject to 50%contribution and special damages of kshs.11,600

    ii. The costs of the suit be borne by the Appellant.

14. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;

    1. That the learned trial Magistrate erred in Law in fact by failing to appreciate that comparable injuries should as far as possible attract comparable awards and thereby made an award of

kshs.800,000 in respect of general damages for pain and suffering which award is manifestly too high, inordinate and excessive in the circumstances.

2. That the learned trial magistrate erred in law and fact by failing to appreciate that special damages must be proved and thereby making an award of kshs 11,600/= in the absence of strict proof.

3. That the learned trial Magistrate erred in law and in fact in failing to appreciate or consider the written submissions of the defendants and authorities cited on quantum.

4. That the learned trial magistrate failed to consider all relevant considerations and principles in assessing the quantum of general damages.

5. That the learned trial Magistrate erred in law by writing a judgement that is not based on proper evaluation of pleadings, evidence on record, submissions and applicable law and principles for award of damages.

6. That in the circumstances, the judgement of the learned trial Magistrate is a miscarriage of justice.

15. The appellant proposed that the appeal be allowed with costs, the judgement delivered by the learned magistrate on 26th July 2023 be set aside and the court herein be pleased to reassess the general damages payable to the plaintiff, the costs of the appeal and the lower court's suit be borne by the respondent herein and any other or further relief the court may grant.

16. The respondent filed a cross-Appeal dated 12th October, 2023 on the following grounds:

a. The learned trial magistrate's decision to find the Minor was equally or 50% liable for the occurrence of the material accident, is wholly unsupported by the facts of the case, the evidence tendered in court, the principles of law and the applicable judicial precedents, therefore the same is unreasonable, erroneous and has occasioned miscarriage of justice.

b. The learned trial magistrate erred in law and fact in failing to give appropriate consideration to the witness testimony of the Appellant's driver who admitted the motor cycle ferrying the Minor had right of way by reason of which neither the motor cycle rider nor the minor could be at fault for the material accident.

c. The learned magistrate erred in law and fact in awarding the cross Appellant inordinately low general damages for pain and suffering thereby arriving at an erroneous decision.

d. The learned magistrate erred in law and fact in finding the cross appellant had not proved her case on a balance of probabilities thereby arriving at erroneous decision.

e. The learned trial magistrate's judgement as a whole is not supported by the evidence that was tendered in court the submissions made by the cross Appellant and the legal authorities provided thereof.

17. The cross appellant prayed the cross appeal be allowed and the entire judgement delivered on 26th July 2023 by Hon. Wafula Mbayaki(Senior resident magistrate in Marimanti SPMCC No. E002 of 2021be set aside, the court do proceed and enter its own judgement in Marimanti SPMCC No. e002 of 2021in terms of their pleadings and submissions and the costs in the subordinate court and the cross appeal be awarded to the cross appellant herein.

18. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 6th May, 2024 through the firm of Macha Advocates LLP while the respondent filed his submissions dated 30th May 2024 through the firm of Kaimba Peter & Co. Advocates.

**Appellant's Submissions**

19. The Appellant submitted on a brief background of the matter and outlined the duties of an Appellate court. The Appellant relied in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others (1968)EA .

20. The Appellant submitted on the issue of quantum and outlined the role of the Appellate court as established in the case of Joseph Kyalo Maundu -vs- Moses Musau Mulela & another [2019] eKLR citing the decision of the court of Appeal in Bashir Ahmed Butt-vs-Uwais Ahmed Khan (1982-1988) KAR.

21. It is the Appellant's submission that the injuries pleaded by the Plaintiff did not warrant an award of Kshs. 800,000/- and in circumstances the said amount is inordinately excessive and unjustified. That the Appellant therefore implores the Court to set aside the award.

22. The Appellant submitted that a perusal of the lower court's judgement despite awarding the impugned general damages the learned trial magistrate failed to cite the authorities relied upon in arriving at the sum of kshs 800,000 and therefore the award of general damages was without any basis and did not consider the submissions of parties particularly the defendant/Appellant herein.

23. The Appellant submitted that in their submissions dated 7th July 2023 an award of kshs 200,000 would be sufficient in view of the pleaded injuries to wit deep laceration of the upper lip, right 2nd upper incisor fracture with several loose teeth, blunt chest and abdominal trauma, degloving injury on the right big toe, abrasions on the hands, elbow and forehead, multiple abrasions and lacerations injuries.

24. The Appellant further submitted that it is noteworthy that the foregoing injuries are majorly soft tissue injuries and their severity does not warrant the award of Kshs. 800,000/-. The Appellant relied in the case of James Nganga Kimani & another v Giachagi Njoroge & 2 others [2019]eKLR .

25. It is the Appellant's submission that the foregoing authority addressed injuries that are highly comparable to the injuries pleaded by the Plaintiff/ Respondent herein. Therefore, an award of Kshs.200,000/-would have been adequate. Further, noting that the age of the said authority they submitted that enhancement of the submitted amount on account of inflation would still not result in an award exceeding Kshs. 300,000/-. The Appellant relied in the case of Matunda(Fruits) Bus services Ltd vs Agnes Chepngeno Tuiya (2021)eKLR.

26. The Appellant further relied in recent cases of Washington Mukunya Karanja &another v Margaret Wambui Maina [2020J eKLR and in Ng'ang'a John & another v David Ogot Agola [2021] eKLR.

27. It is the Appellant's submission that foregoing authorities relate to injuries highly comparable to the injuries pleaded by the Respondent herein. Therefore, the lower court award of Kshs. 800,000/- cannot be reasonably justified and they submit that the same was without any regard to any comparable awards.

28. The Appellant submitted that that had the learned trial magistrate considered the foregoing authorities, the award of Kshs. 800,000/-would not have been arrived They implore the court to find that the said award is inordinately excessive and substitute it with an award not exceeding Kshs. 300,000/-.

29. It is the Appellant's submission that the trial court failed to make a proper determination based on the evidence on record, guiding legal principles and case law. They therefore pray that the appeal herein be allowed, and the judgment of the lower court be set aside and replaced by a judgment of this court and costs of this appeal be granted to the Appellant.

**Respondents Submission**

30. The respondent submitted on a brief background of the matter and identified three issues for determination. The first issue for determination was whether the minor bore any liability for the material accident, whether the quantum of awards of damages should be upheld or substituted with a fresh determination by the court and the appropriate order as to cost.

31. The respondent submitted by adopting the analysis of the nature of an appeal as pronounced in the cases Ainusu Shamsi Hauliers Limited v Moses Sakwa & Another(Suing as the Administrators of the estate of Ben Siguda Okatch(Deceased) (2021)eKLR,Abok Jamjes Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates (2013)eKLR, Mkube v Nyamuro (1983)LLR at 403 and Butt v Khan(supra).

32. It is the respondent's submission that the core grievance of the Cross-Appellant is the learned magistrate's decision to find the Minor bore 50% liability for the material accident. That the Cross-Appellant further argues that the learned magistrate erred in overlooking the Appellant admission that the Minor had right of way.

33. The respondent relied on the impugned Judgment pg.82 of the Record of Appeal. The learned magistrate held:.....

> " The starting point, prima facie, therefore is the drivers of the motor vehicle and the motorcycle, then the passengers, the insurance company or owners of the motor vchicle and motorcycle for any tortious liability in negligence.
>
> ...The people in control must, as per the doctrine of Res Ipsa Loquitor be called upon to give a reasonable explanation, failing which they will be held liable, of course due regard being given to the provisions of Section 107 and section 108 of the *Evidence Act*, that he who alleges, must prove her case on a balance of probabilities.
>
> For the accident to occur the drivers primarily contributed to it. Therefore liability is 50:50.The owners of the motor vehick, too are vicariously liable prima facie."[Underlining added]

34. The respondent submitted that they find fault with the learned magistrate's presumption that a passenger can be liable for an accident without qualifying the circumstances under which such passenger bears liability. The respondent relied in the case of Viviane Anyango Onyango & another v Charity Wanjiku [2017] eKLR.

35. It is the respondent's submission that it is common knowledge that a passenger does not control the vehicle they are travelling and cannot therefore control how well or poorly it is driven unless specific contrary evidence is produced. That at the trial court no singular evidence was produced to indicate the Minor was in control of the motorcycle they rode meaning they could not be responsible in any way for the accident and the resulting loss. As such liability cannot be held against the Minor in fact or in law for causing the material accident

36. The respondent submitted that they fault the trial court for fixing any liability on the rider of the motorcycle and the Minor who was ferried on since the Appellant being the driver of motor vehicle reg. no. KCL 283 E admitted motorcycle reg. no. KMFA 842 had right of way meaning vehicles joining the road should await the safe passing of the motorcycle or await permission to enter from the motorcycle before oncoming traffic may join the road ahead of the motorcycle.

37. The respondent submitted that at the trial, the Appellant produced the testimony of DW2 who adopted his written Statement and testified that the material accident occurred as he was at an intersection entering a feeder road which the motorcycle was riding on and the point of collision was at the left front side of the car.

38. The respondent submitted further that it was admitted that the accident happened at the intersection, meaning the motorcycle had right of way but the motor vehicle did not wait until it was clear and safe to join the road. Subsequently, the motor vehicle was negligently driven.

39. It is the respondent's submission that the clear evidence on record is therefore directly contradictory to any presumption that the motorcycle and the Minor was ferried on was at fault for causing the material accident and as such the Minor cannot bear minimal or any liability for the accident. That the Cross Appellant made similar arguments in their trial court submissions which are omitted from the Record of Appeal however the learned magistrate failed to address them at all in the impugned Judgment or even to explain how the court concluded the motorcycle was in any way liable for the accident.

40. The respondent submitted that that such an approach is inadequate and offends the provisions of Order 21 Rule 4 of the Civil Procedure Rules whereby the law and good practice require the trial court to resolve each conflicting evidence or argument of the parties and give reasons for the same. Only such an outcome would satisfy the duty to do justice to each party as demanded by Article 159(2)(a) of *the Constitution* of Kenya 2010.

41. The respondent submitted that the learned magistrate failed to resolve the issues in controversy and issued a decision on wrong principles or by misapprehension of evidence and the same should be set aside in the interests of justice. The respondent urged the Court to find the Appellant was wholly liable for the material accident and apportion 100% liability on the him.

42. The respondent submitted on the second issue on quantum. The respondent submitted on the issue of special damages.

43. It was submitted that in the impugned Judgment the learned magistrate awarded the Cross-Appellant KShs. 11,600/= in special damages. That ground 2 of the Appellant's appeal challenges the award of special damages however they failed to make submissions on the same. The Cross-Appellant supports the award and therefore the award of KShs.11,600/=in special damages is jointly conceded and should be upheld.

44. The respondent submitted on general damages of pain and suffering. The respondent submitted that in the impugned Judgment the learned magistrate awarded the Cross-Appellant KShs.800,000/= in general damages. That ground I of the Appellant's appeal argues the trial court awarded excessive general damages based in the circumstances and failed to consider the Appellant's submissions and judicial authorities.

45. The respondent submitted that the Cross-Appellant argues that the award was erroneous but only in light of the 50% contributory negligence applied that reduced the award to KShs. 400,000/=.

46. It is the respondent's submission that in the impugned Judgment the learned magistrate observed that the Minor had 5 % incapacitation and sustained injuries of a deep laceration of the upper lip through

the philtrum slicing it into two, right 2nd upper incisor fracture with several loose adjacent teeth, blunt chest and abdominal trauma (no visceral injuries), degloving injuries on the antero-medial aspect of the right big toe, and multiple abrasion and laceration injuries on the right ilias fossa, dorsum of both hands, below elbow region and forehead. The Minor's injuries were confirmed by a medical report and are not controverted.

47. The respondent submitted that it is therefore clear that the Minor's injuries were properly captured by the trial court and the Appellant had opportunity but failed to produce contradictory testimony or documentary evidence and it follows that the Appellant's argument that the learned magistrate misapprehended the evidence is erroneous.

48. The respondent submitted that on damages that the learned magistrate noted that the Cross-Appellant was seeking damages of KShs.900,000/=while the Appellant proposed damages of KShs. 200,000/.That the trial court proceeded to award KShs. 800,000/s subject to contributory negligence.The only contention is therefore whether the award issued in general damages for pain and suffering was comparable to similar cases and the particular circumstances herein.

49. It is the respondent's submission that in the trial court submissions the Cross-Appellant submitted 4 authorities to guide the court namely Easy Coach Limited v Emily Nyangasi [2017] eKLR, and Moses Wakibi Njoroge v PMM & another [2021] eKLR, and Prem Gupta & another v Grimley Otieno &3 others [2018] eKLR, and Gusii Deluxe Limited & 2 Others v Janet Atieno (2012) eKLR all of which issued awards ranging between KShs. 500,000-800,000.

50. The respondent submitted that that the injuries in the above authorities are all similar in nature to the Minor's injuries herein and also involve cases of permanent incapacity like the Minor herein who sustained 5% degree of incapacity thus they cannot identify any legal or factual error in the trial court's decision to award KShs. 800,000/s. The respondent submitted that as much as parties may assist the court by sourcing judicial authorities favorable to their desired award those authorities remain purely persuasive and the trial court retains final discretion to quantify the appropriate award.

51. The respondent further submitted that on the Appellant's part they submitted 2 authorities to guide the court namely James Nganga Kimani & another v Giachagi Njoroge & 2 others [2019| eKLR, and Matunda (Fruits) Bus Services Ltd v Agnes Chepngeno Tuiya [2021]eKLR.That in those cases the court awarded KShs. 200,000/=and 250,000/=respectively as general damages for pain & suffering. However, those authorities did not involve injuries similar to the Minor's injuries herein and never involved permanent incapacitation like the case therein and as such the trial court was justified in departing from them.

52. The respondent submitted that they note that the Appellant has purported to submit entirely new authorities on their appeal submissions which authorities were not submitted at the trial court for consideration. The respondent submitted that the practice is disingenuous and offends the reasoning in Sila Tiren & another v Simon Ombati Omiambo(2014)eKLR.

53. It is the respondent's submission that that the Appellant's challenge is a case of sour grapes because they wanted the trial magistrate to issue a lower award rather than a challenge against any aspect of law or fact. They therefore urge that the award of KShs. 800,000/- in general damages for pain and suffering was factually appropriate and legally sound and should be upheld.

54. The respondent submitted on the third issue on cost and submitted that on the cost of the appeal and the trial court the general rule is the victor go the spoils and relied on section 27 of the *Civil Procedure Act*.

55. The respondent submitted that they pray the Court to set aside the Judgment in Marimanti SPMCC NO. E002 OF 2021, the court dismisses the Appellant's Memorandum of Appeal dated 21st August 2023 and proceed to allow the Cross-Appellant's Memorandum of Cross Appeal dated 12th October 2023 as per their submissions herein. They therefore pray for a final Judgment on Marimanti SPMCC NO. E002 OF 2021 as follows:

a. Liability at 100% against the Appellant in favor of the Respondent/Cross-Appellant.

b. Award the Respondent/Cross-Appellant Quantum of compensation tabulated thus:

i KShs.800,000/=in general damages for pain and suffering.

ii KShs.11,600/=in special damages.

Total quantum=KShs.811.600/=

**Analysis & Determination**

56. The Court of Appeal held in the case of Mark Oiruri Mose vs. R. (2013) eKLR that:-

> "This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

57. Thus, this Court is required to review and analyze the entire Record and evidence presented before the lower courts in respect of the present appeal and draw its own conclusion, bearing in mind that the benefit of hearing firsthand evidence from the witnesses themselves is lacking.

58. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:

i. Whether the trial Magistrate erred to find that the minor bore 50% liability for the material accident.

ii. Whether the trial magistrate erred in awarding kshs 800,000 in respect of general damages for pain and suffering which award is manifestly too high, inordinate and excessive in the circumstances.

iii. Whether the trial magistrate erred in law and fact by failing to appreciate that special damages must be proved and therefore awarded kshs 11,600 in the absence of strict proof.

iv. Whether the trial magistrate erred in failing to appreciate or consider the written submissions of the appellants and authorities cited on quantum.

v. Who bears the costs of the suit?

Whether the trial Magistrate erred to find that the minor bore 50% liability for the material accident.

59. It is the respondent's submission that the core grievance of the Cross-Appellant is the learned magistrate's decision to find the Minor bore 50% liability for the material accident. The Cross-Appellant further argues that the learned magistrate erred in overlooking the Appellant admission that the Minor had right of way.

60. I have perused the impugned judgement and it indicates that the respondent was apportioned 50:50 liability. The issue is however whether the said pillion passenger ought to have been found 50% liable. In this case this court is being called upon to interfere with the trial court's finding of liability. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

61. That seems to have been the position in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981,

> where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

62. The respondent submitted that they find fault with the learned magistrate's presumption that a passenger can be liable for an accident without qualifying the circumstances under which such passenger bears liability. The respondent relied in the case of Viviane Anyango Onyango & another v Charity Wanjiku [2017] eKLR.

63. I have perused the plaint and it indicates that on or about 27th September 2020 the respondent was lawfully travelling as a pillion passenger abode m/cycle registration no. KMFA 842 Y ridden along the Tunyai Kathwana road when the Appellant so negligently drove, managed and/or controlled motor vehicle registration no. KCL 283 E Nisan Tilda causing it to veer off its rightful lane and crushing into the motor cycle the respondent was riding in occasioning him serious injuries.

64. I find that the trial court was wrong to award liability to a passenger who had no control of the motorcycle and the respondent ought to have been awarded 100 % liability.

Whether the trial magistrate erred in awarding kshs 800,000 in respect of general damages for pain and suffering which award is manifestly too high, inordinate and excessive in the circumstances.

65. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not

entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

66. 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."

67. 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..."

68. 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."

69. In this case, the Respondent sustained injuries of a deep laceration of the upper lip through the philtrum slicing it into two, right 2nd upper incisor fracture with several loose adjacent teeth, blunt chest and abdominal trauma(no visceralo injuries)de gloving injury on the antero medical aspect of the right big toe and multiple abrasion and laceration injuries on the right iliac fossa, dorsum of both hands, elbow region and forehead. Clearly the respondent suffered soft tissue injuries.

70. It is the Appellant's submission that the injuries pleaded by the Plaintiff did not warrant an award of Kshs. 800,000/- and in circumstances the said amount is inordinately excessive and unjustified. That the Appellant therefore implores the Court to set aside the award. The Appellant further submitted that it is noteworthy that the foregoing injuries are majorly soft tissue injuries and their severity does not warrant the award of Kshs. 800,000/- and the court ought to have awarded kshs 300,000.

71. I am guided by the decisions of Martha Agok v Kampala Coach [2017] eKLR where the appellant sustained injuries on the face; lost one incisor tooth and fractured another, as well as blunt trauma on the lower abdomen, chest and right leg, the court awarded Kshs. 350,000.00 as general damages

72. In Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR, wherein the 3rd Plaintiff was awarded general damages of Kshs. 350,000.00 for multiple soft tissue injuries, injury on the left elbow joint and injuries on both ankles.

73. In Francis Ochieng & another v Alice Kajimba [2015] eKLR, in which Kshs. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries.

74. In Isaac Katambani Iminya v Firestone East Africa (1969) Limited [2015] eKLR where the court awarded appellant Kshs. 350,000.00/= as general damages for multiple soft tissue injuries and;

75. In Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR, in which the appellate court upheld the award of general damages in the sum of Kshs. 300,000.00/= for bruises on the right parietal region, 2 loose lower incisors, dislocation of the right shoulder, cut on the left leg, bruise on the dorsum of right hand and blunt chest injury.

76. In Gusii Deluxe Limited & 2 Others v Janet Atieno (2012) eKLR in which the respondent sustained deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right - upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest. The injuries had left the respondent with ugly keloid scars on the head and face. The Court of Appeal upheld an award of Kshs. 500,000/=.

77. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see Tayab v Kinanu [1983] KLR 114 and West (H) & Son Ltd v Shephard [1964] AC 326, 345).

78. Following the foregoing authorities, I find that the award of kshs 800,000 is excessive and instead award kshs 450,000 considering the current prevailing economic circumstances of inflation in the country.

Whether the trial magistrate erred in law and fact by failing to appreciate that special damages must be proved and therefore awarded kshs 11,600 in the absence of strict proof.

79. The Appellant filed the ground that the trial magistrate erred in law and in fact by failing to appreciate that special damages must be proved. However, the Appellant failed to submit on the same. The respondent particularized special damages as medical expenses kshs 1050, medical report kshs 5,000 demand notice kshs 5,000 and a copy of records kshs 550/= which amounted in total as 11,600.

80. The respondent submitted that ground 2 of the Appellant's appeal challenges the award of special damages however they failed to make submissions on the same. The Cross-Appellant supports the award and therefore the award of KShs.11,600/=in special damages is jointly conceded and should be upheld.

81. 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."

82. 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.)

83. This court has carefully perused and evaluated the evidence presented in support of special damages by the Respondent. It emerges that only medical report of a general practitioner of kshs 5,000 was produced and a medical expenses kshs.1050.The demand notice of kshs 5,000 and a copy of records kshs.550/ was not produced as such I award special damages of kshs. 6,050 which was proved.

84. The Appeal partly succeeds and each party should bear their own cost.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF NOVEMBER, 2024.**

6/11/2024

Mr. Kaimba for Respondent

Mr. Kuria Kamau for Appellant – Absent

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

6/11/2024