REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 38 OF 2019

SHADRACK MATHIAS..1ST APPELLANT

KIETI MATHIAS..2ND APPELLANT

VERSUS

AGNES MULUKI WAMBUA....................................RESPONDENT

(Being an appeal from the judgement of the Magistrate's Court at Kangundo (Honourable M. Opanga SRM) delivered on 22nd of January 2019 as amended on 19th of February 2019 in SPMCC 85 of 2017)

BETWEEN

AGNES MULUKI WAMBUA...PLAINTIFF

VERSUS

SHADRACK MATHIAS..1ST DEFENDANT

KIETI MATHIAS..2ND DEFENDANT

JUDGEMENT

1. The genesis of this appeal was a road traffic accident involving motor cycle registration number KMCT 453L and motor vehicle registration number KBQ 566Q that were being driven by the Respondent and the 2nd Appellant respectively along Kangundo - Machakos road on 12th December, 2015. The suit before the trial court was commenced by the Respondent against the Appellants herein in which it was alleged that the 1st Appellant was the owner of the said motor vehicle while the 2nd Appellant was negligent in the manner which he drove the same leading to an accident that caused her to sustain the following injuries;

a) Blunt injury on the left leg

b) Left tibia plateau

c) Fracture of the left malleolus and,

d) Cut wounds on the left ankle.

2. The Respondent therefore claimed:

1) Special damages of Kshs. 171,170

2) Future medical expenses of Kshs 150,000

3) General damages for pain and suffering

4) Costs of the suit

5) Interest on a) ,b) ,c) ,d) at court rates

6) Any other relief as this Honourable court may deem fit and just to grant.

3. Before the trial court a consent was recorded on liability in which the same was apportioned in the ration of 70:30 in favour of the Plaintiff against the Defendant. It was also agreed by consent that parties would file submissions to which the supporting documents would be attached.

4. On behalf of the Respondent it was submitted that she sustained Blunt injury on the left, left tibia plateau, Fracture of the left malleolus and cut wounds on the left ankle based on the documents exhibited and that according to the report of **Dr Wambugu**, the degree of incapacitation was 12%. She developed a walking gait as a result of the accident. Before the trial court the Respondent proposed an award of Kshs. 2,000,000 in general damages and Kshs. 300,000 for future medical expenses.

5. On their part, the Appellants proposed that the award should not be more than Kshs.250, 000 based on the 2nd Medical report by **Dr. Wambugu P.M** dated 3rd November, 2017.

6. By a judgement delivered on 22nd January, 2019, the court assessed the general damages in the sum of Kshs 2,000,000.00 and awarded Kshs 150,000.00 and future medical expenses and Kshs 118,450.00 special damages.

7. Aggrieved by this decision, the appellants have lodged this appeal based on the following grounds:

1) The Learned Trial Magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount an erroneous estimate of the loss suffered by the Respondent.

2) The Learned Trial Magistrate's award of future medical expenses is so manifestly excessive as to amount an erroneous award of the award proposed by the medical doctors and their respective reports.

3) The Learned Trial Magistrate's award of special damages was erroneous as the same was not strictly rover as required by law

4) The Learned Trial Magistrate erred in both fact and in law by ignoring the Defendant's written submissions and authorities cited therein in assessing general damages, future medical expenses and special damages.

8. The Appellants therefore sought the following reliefs:

a) That the judgement and award on pain and suffering and loss of amenities, future medical expenses and special damages be set aside and/ substituted with an assessment thereof at a much lower amount commensurate with the injuries sustained by the Respondent

b) Costs for the appeal and the lower court proceedings.

9. In this appeal, the following the only issue that falls for determination is whether the award made by the Learned Trial Magistrate was reasonable in the circumstances and who should bear the costs of this appeal.

10. In this appeal, it is submitted on behalf of the appellants that the amount awarded was too high. They opine that the court relied on authorities that were not commensurate to the injuries suffered. They submit that the court should have relied on the case of **Daniel Nyandika Kimori vs Monocah Achieng Ogola (2016), Civicon Limited Vs Richard Njomo Omwancha & 2 others [2019] eKLR** where the award was reduced to Kshs. 450,000, **Naomi Wambua Njiraini Vs Prof. Ezra Kiprono Maritim [2010] eKLR** where an award of Kshs 450,000 was given and **Imeo Engineering & Building Contractors Limited vs Joseph Macharia Karanja [2015] eKLR** where an award of Kshs. 160,000 was given as opposed to the case of **Charles Mwania & Another vs Batty Hassan [2008] eKLR, Arrow Car Limited Vs Bimomo & 2 others [2004] 2KLR** and **Denshire Muteti Wambua vs Kenya Power & Lighting Company Limited Civil appeal no 60 of 2004**.

Determination

11. In this appeal, it is clear that the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.**

12. It was therefore held by the Court of Appeal in Court of Appeal stated in **Mbaka Nguru and Another vs. James George Rakwar NRB**

CA Civil Appeal No. 133 of 1998 [1998] eKLR that:

> **"The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."**

13. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted. The circumstances under which an appellate court can interfere with an award of damages were therefore restated by Court of Appeal in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** where it was held 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…"**

14. 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."**

15. 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…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

16. It is therefore not the amount that the appellate Judge would have awarded had he been sitting as the trial court that determines whether or not to interfere with the award. As was appreciated by the Court of Appeal in **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**:

> **"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."**

17. The position was restated by Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** 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."**

18. 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."

19. In this case, on 7th August, 2018, the parties' counsel recorded a consent in which it was agreed that they would file written submissions on quantum and attach their claim supporting documents to their submissions. It was based on the foregoing that the award was assessed. My understanding of the foregoing was that the parties having recorded a consent on liability each party was at liberty to annex the documents in support of the quantum. It was not stated that the said documents were to be produced in evidence because the consent did not deal with the calling of witness.

20. This Court has had occasion to deprecate that mode of conducting legal proceedings. Parties, when they intend to have documents admitted without calling the makers ought to ensure that there is no inconsistency in the documentation since where a consistency arises it can only be resolved by calling the makers who would ordinarily be subjected to cross-examination in order to confirm their veracity. That would be case where two inconsistent medical reports were by consent produced by the parties. To my mind once parties agree on liability they ought to endeavour to harmonise the various medical or expert reports on record and agree at a common ground regarding the basis upon which assessment of damages is to be undertaken. If they are unable to do so, the makers of those reports ought to be called where the reports are conflicting for cross-examination. It is however unfair to the court to just throw all manner of reports ate the court and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by **Ringera, J** (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

> **"the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise."**

21. The same Judge in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** held that:

> **"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident."**

22. In my view parties and their counsel ought not to just throw medical reports or expert opinion reports for that matter which are divergent in material aspects without calling the makers thereof. This was the position of the Court of Appeal in **Auni Bakari & Another vs. Hadija Olesi Civil Appeal No. 70 of 1985** where it held that it is desirable to call a doctor to explain the discrepancy in a medical report.

23. The procedure of admitting in evidence expert opinion reports which are not substantially the same is, in my view, a short cut that ought not to be permitted in litigation. As was held by **Ringera, J** (as he then was) in **David Ndung'u Macharia vs. Samuel K Muturi & Another Nairobi HCCC No. 125 of 1989:**

> **"…an order that a medical report be agreed, or in the alternative that medical reports be exchanged, and that the attendance of doctors as witnesses should be dispensed with ought never to be made as a matter of form. The Court must be satisfied by the applicant for such an order that undue delay or expense would be caused in the suit unless the attendance of doctors is dispensed with… There are cases in which the order may be useful, as for instance, where a man has broken his leg and the doctor is only required to say how long the man has suffered and that there is no permanent injury. There may be cases in which there is no permanent injury and one does not require a doctor to tell one that, if there is no disagreement about it…However, in a case where prognosis is an important matter, it is most desirable that a doctor, or doctors should be present in court to answer any questions which the Judge may wish to ask and this is because we ought not to discourage the making of that order in proper cases, but the direction ought not to be included as a matter of course. The master to the Registrar should consider whether the case is suitable for hearing with a report and if it is, the order ought to be made and the parties should observe it…The second issue is that it is only an agreed report that can properly be admitted in evidence without calling the maker. The mere exchange of medical reports does not render such report or reports admissible without calling the maker(s) unless one or both of them have been agreed. A direction that medical reports be exchanged is no more than an order in the nature of mutual discovery of medical evidence. It must be understood that orders that a medical report be agreed and the same be admitted in evidence without calling the maker are made for the purpose, not of hindering the administration of justice, but of assisting it. If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately embarrassed between the two views and the two statements. The whole object of the type of order is to ensure that matters of medical fact, and matters of medical opinion shall if possible be agreed by the medical men and that is the object and the sole object of orders of this kind, and indeed no order could achieve anything more. The practice was certainly never intended to admit of inconsistency and differing medical points of view being put before the Judge and described as agreed medical reports. You cannot have an agreement on two inconsistent statements of fact, and the phrase "agreed medical report" means, and means only a report where the**

facts stated are agreed as true medical opinions expressed and accepted as correct. In the normal case in pursuance of an order of this kind, the doctors on the two sides would meet and embody their views in a document which they both may sign and that is very convenient, and would save a great deal of trouble and expense in many cases, but it is not to be understood that orders of this kind are to be made as a matter of course. It would depend very much on the nature of the case and the nature of the injuries, and whether it will save trouble and expense and in the long run by dispensing with the doctors at the hearing. On an interlocutory application some discretion must be exercised by the master who is making the order as to whether it will be a saving of expenses to make this type of order, but it must not be taken that is all that is necessary. The case may be one where the report of the first doctor is accepted by the other doctor. If on the other hand there are likely to be points of controversy, then if the agreement is to be completed they can only solve them by coming to an agreement, and if they cannot come to an agreement, there can never be an agreed report and that is the object of this procedure…In short it is for the parties' doctors (and not the parties themselves, or their advocates) to agree on a medical report and if the doctors have not agreed by either adopting one report or jointly authorising a single report there is no agreed report…In the circumstances of this case, the court is satisfied that there was no agreed report and accordingly the orders made at the hearing of the summons for directions did not relieve the plaintiff off the burden of calling the doctor to testify and as he did not come to testify, his report is held to be inadmissible in evidence and the court will not look at it for any purposes in the trial. P3 form is admissible in evidence as an entry in a public record stating a relevant fact within the contemplation of section 38 of the Evidence Act and the court will bear its contents in mind in assessing the damages."

24. Where parties intend to rely on medical reports only they ought to confirm that the same are substantially the same in terms of injuries sustained. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

"The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."

25. However, once the parties produce the same by consent the court has no option but to make the best out of them. In **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**, the Court of Appeal held that:

"The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as "No qualifications disclosed; the doctor is not a consultant". If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident."

26. The words of **Byamugisha, J** in **Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987** however need to be taken note of. In that case the learned judge held, citing ***Sarkar on Evidence*** 12th ED pp 506.R. that:

"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."

27. In this case, both medical reports confirmed that the Respondent sustained fracture of the left tibial plateau, fracture of the left lateral malleolus, cut wound dorsal aspect left foot and blunt injury to the left leg. In awarding the sum of Kshs 2,000,000.00 as general damages, the Learned Trial Magistrate relied on the said medical reports that estimated the degree of incapacitation at 12%, and noted that the nature of the injuries was skeletal and blunt trauma from which the plaintiff had made adequate recovery and the fact that the fractures had been reunited and the metal implants would require implants in the future.

28. In determining the award of damages, the court has to rely on recent comparable awards and this was appreciated by the Court of Appeal stated in **Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** where it was held that:

"The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

29. I have considered the comparable awards cited before me in this appeal and it is my considered view that an award of Kshs 2,000,000.00 was manifestly excessive in the circumstances. Taking into account the inflationary tendencies, I hereby substitute the same with Kshs 1,000,000.00 in respect of the general damages.

30. As for the award for future medical expenses, two medical reports were produced. However, the same were not consistent and the court seems to have based its opinion on both without necessarily wholly adopting one. In light of the state of the pleadings, the factual findings of

the cost of future medical expenses cannot be disturbed since the Learned Trial Magistrate was at liberty to rely on any of the medical reports presented before her. The mere fact that she chose one and not the other does not justify interference. This is not a case where the court arrived at a finding without evidence but where the court relied on the evidence on record as it was perfectly entitled to so do.

31. As regards the issue of stamp duty, the Court of Appeal in the case of **Paul N. Njoroge vs. Abdul Sabuni Sabonyo [2015] eKLR** held that;

> ***"21. 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 vs. 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. -vs- Bhaloo (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854 that:**
>
> **"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.***
>
> ***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."***

32. Therefore, the the mere failure to pay the stamp duty does not nullify the instrument in question. My position is supported by the decision in **Azad Kara vs. Mwangi Mutero Mombasa HCCC No. 222 of 1997** where it was held that whereas it is mandatory under section 19 of the ***Stamp Duty Act***, Cap 480 Laws of Kenya for an agreement to be stamped in order for it to be admissible in evidence however that does not make the document useless in evidence as the omission is curable under section 20 of the ***Stamp Duty Act***. Further as was held by **Law, J** (as he then was) in **Sunderji Nanji Limited vs. Mohamedali Kassam Bhaloo [1958] EA 762,** "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 of paying 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 second defendant/respondent, and he must be given that opportunity." It is therefore my view that the mere fact that the transfer document may not have been stamped even if true would not necessarily render the same inadmissible. However, this issue was raised only in submissions hence has little if any evidential weight.

33. Therefore, save for the issue of an award of general damages, this appeal otherwise fails. There will be no order as to costs. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF MARCH, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyimi for Mr Ndegwa for the Appellant

CA Geoffrey