



REPUBLIC OF KENYA



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**Juma & another v Wafula (Civil Appeal E030 of 2023)
[2025] KEHC 9176 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E030 OF 2023**

**MS SHARIFF, J
JUNE 26, 2025**

BETWEEN

PATRICK WASAU JUMA 1ST APPELLANT

OMBEGO NYABONYI ZILPAH 2ND APPELLANT

AND

JOSEPH WAMALWA WAFULA RESPONDENT

*(Being an Appeal from the Judgment/Decree of the Honourable Tom Mark Olando-
PM delivered on the 23rd March 2023 in Bungoma CMCC No. 232B of 2020)*

JUDGMENT

Introduction

1. This is an Appeal seeking to set aside the decision of the trial Court on liability and quantum and that the appellants be awarded costs of this appeal.

Background

2. By a plaint dated 18th November 2020, in Bungoma Chief Magistrate’s Court Civil Suit No. E. 232 of 2020, the Respondent sued the Appellants herein for general damages for pain and suffering, loss of amenities and future medical expenses, special damages of Kshs 231,833/=, costs of the suit, and interest for bodily injuries sustained out of a road accident that occurred on 1st August 2021, at Bwema area along Bungoma-Malaba road.
3. The Respondent filed a tortious liability claim against the appellants in the lower court premised on alleged bodily injuries sustained due to the negligent driving of the latter’s Motor Vehicle Registration Number KAS 687F, make Toyota Corolla, which ran over the respondent while he was riding as a pillion passenger on board Motor Cycle Registration Number KMFD 428R.



4. The Appellants in their response denied the particulars of negligence attributed to them and stated that if the accident occurred the same was wholly caused by the negligence of the Respondent.
5. During the hearing, the Respondent called four witnesses, while the 1st Appellant testified as sole witness in the Appellants case.
6. After hearing and an in-depth analysis of the evidence before Court, the trial Court found both the Appellants equally liable for the said accident. The trial Court proceeded to award the following: -
 - a. General damages Kshs. 400, 000/=
 - b. Special damages Kshs 230,833/=Total Kshs 630,833/=
- c. Plus, costs and interest from the date of the judgement.

Appeal

7. Being aggrieved with the Judgment of the trial Court, the Appellants filed their Memorandum of Appeal dated 18th April 2023, appealing against the whole Judgement. They relied on the following grounds:-
 - a. That the learned trial magistrate erred in law and fact in finding the Appellants 100% liable for the alleged accident without evidence in that regard.
 - b. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's case for failing to establish fault against the Appellants.
 - c. That the learned trial magistrate erred in law and fact in failing to consider the submissions filed in the matter by the Appellant and in holding that the Appellant herein did not file submissions contrary to the documentary evidence on record.
 - d. That the learned trial magistrate erred in law and fact in holding that the evidence of the Respondent herein was unchallenged contrary to the documents on record; the defense, defense witness statement and the evidence adduced by the Appellants on record.
 - e. That the learned trial magistrate erred in law and fact in holding that the Appellants did not call any witnesses when the defense witness testified in Court on 15th February 2023, he judgement erroneous judgement that does not reflect the true set of facts.
 - f. That the learned trial magistrate erred in law and fact in awarding the Respondent herein general damages of Kshs.400,000/= against the weight of the evidence on record as to the injuries suffered leading to an excessive award which does not reflect the injuries sustained.
 - g. That the learned trial magistrate erred in law and fact in applying the wrong principle in law and misdirected herself in awarding general damages without considering the extent and magnitude of the injuries, evidence as tendered by the doctor and comparable authorities.
 - h. That the learned trial magistrate erred in law and fact in awarding special damages without considering the Appellants position that the receipts were not duty stamped in compliance with the Stamp Duty Act therefore, inadmissible as they were not strictly proven.
 - i. That the learned magistrate erred in law and fact in awarding special damages which had not been specifically pleaded and strictly proved.



- j. That the learned trial magistrate erred in law and fact in awarding special damages which had not been specifically pleaded and strictly proved.
- k. That the learned trial magistrate erred in law and fact in failing to hold that the Respondent was not entitled to the claim of medical expenses as pleaded since the amount was paid by NHIF hence not awardable.
- l. That the learned trial magistrate erred in law and fact in failing to uphold the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

Cross-Appeal

8. The Respondent being equally dissatisfied with the Court's judgment and decree, filed a Cross Appeal dated 27th February 2024, seeking that the cross appeal be allowed, the trial Court's judgment on quantum set aside and costs of the appeal. The cross-appeal is premised on four grounds, namely: -
- a. That the learned trial magistrate erred in law and fact in fact on his assessment on quantum of damages when he failed to consider the severe nature of injuries suffered by the Respondents before making an award of Kshs. 400,000/= that was overly low in the circumstances of the case.
 - b. That the learned trial magistrate erred in law and fact in failed to pay regard to the medical evidence produced by the Respondent before passing the award on quantum hence occasioning a miscarriage of justice.
 - c. That the learned trial magistrate erred in law and fact in failing to pay regard to the decision and authorities filed alongside the Plaintiff's submissions that were guiding on the assessment of the amount of quantum.
 - d. That the learned trial magistrate exercise of discretion in the assessment of quantum of damages was unfair to the Respondent.
9. As follow up to the Appeal and Cross Appeal, the Appellant filed his submissions dated 13th December 2024, in support of their appeal and opposing the cross appeal while the counsel Respondent noted that she filed her written submissions in support of the cross appeal and opposing the appeal, but the same is not part of the Court record.

Appellants submissions

10. The Appellant identified the issues for determination as per the grounds of appeal as follows:
- a. Whether the Respondent proved his case on a balance of probability against the Appellant to warrant liability of 100%?
 - b. Whether an award of Kshs. 400,000/= by the learned trial magistrate as general damages was justified and manifestly excessive?
 - c. Whether the special damages awarded by the learned trial magistrate were specifically pleaded and strictly proved.
11. On the first issue, counsel submits that the finding of the trial Court on liability was erroneous as the Respondent herein failed to prove his case on a balance of probability. Further, counsel argues that liability comes with fault and that there was no credible evidence adduced in that regard. Counsel argues that an occurrence of an accident does not necessarily mean that a particular person is liable



for negligence and that negligence ought to be specifically proved. Counsel submits that the police officer who testified as the Respondent's witness in the trial Court failed to shed the light on who was to be blamed for the accident and noted that he was not the investigating officer in this matter. Further that the police officer had neither the police file nor sketch maps and that as per the availed abstract, the matter was still pending investigations. Counsel relied on the cases of Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi Civil Appeal No. 234 of 2005; Easy Coach Limited & Another v Gideon Otieno Olulu & Another [2021] eKLR; Mukeye v Kovi [Civil Appeal No. 27 of 2019] [2022] KEHC and Eunice Wayua Munyao v Beatrice & Others [2017] eKLR and the book of Charlesworth and Percy on Negligence, 9th Edition at Page 387. Counsel maintains that the Respondent's evidence did not satisfy the dints as per section 107, 108 and 109 of the Evidence Act to warrant apportionment of 100% liability on the part of the Appellants.

12. On the 2nd issue, Counsel submitted that the general damages award of Kshs. 400,000/= is excessive and/or inordinately high considering the injuries incurred by the Respondent herein and this required the interference by this Court as per the cases of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-1988] KAR 5 and Kemfro Africa Limited T/A Meru Express Services and Another v Lubia & Another [1976] eKLR. Counsel proposed that this Court should proceed to award the Respondent an amount between Kshs. 200,000/= and Kshs. 250,000/=. Counsel relied on the case of Osuman Mohamed & Another v Saluro Bundit Mohamed Civil Appeal No. 30 of 1997 [unreported]. While quoting from the case of Kigaraai v Aya [1982-88] KAR 768, he highlighted the importance of damages being set within the limits as set out in decided cases and Kenyan economy. According to counsel, in the cases of Ruth Mosota Momanyi v Ruben Mosota Momanyi [2019] eKLR and S.D.V Transami K. Limited v Scholastica Nyambura [2012] eKLR the Court issued a general award of Kshs. 250,000/= on damages for comparable injuries to the ones sustained by the Respondent herein..
13. On the issue of special damages, counsel submitted that they must be specifically pleaded and strictly proved. Counsel posits that Dr. Adoka only provided an invoice of Kshs. 225, 223/= from Bungoma County Hospital but no receipt was availed to confirm settlement of payment. Further, counsel submits that Dr. Wambasi Mutoro produced a receipt of Kshs. 3,000/= from Mashambani Medical Center but the said receipt did not bear a stamp duty as required by law. Counsel relied on the following cases: Equity Bank v Geral Wang'ombe Thuni [2015] eKLR; Vishva Stone Suppliers Company Limited v RSR Stone 2006 Limited [2018] eKLR and Joseph Kimani and another v James Kangara Kahanya [2017] eKLR. He also relied on Section 19[1] of the Stamp Duty Act Cap 480 Laws of Kenya. Counsel urged this Court to find that special damages were not specifically pleaded and strictly proved as required and that the appeal should be allowed.
14. On the Respondent's cross-appeal, counsel submitted that the award of Kshs. 400,000/= on such minor injuries was without basis and not backed by law and that an award of Kshs. 200,000/= would have sufficed, regard being had to the Kenyan economy. Counsel relied on the case of Rahim Tayab & Another v Anna Mary Kinaru [1997-88]. Counsel urged this Court to dismiss the Respondent's cross-appeal for want of basis.

Respondent's Submissions

15. On 24th February 2025, Mr. Komora holding brief for Mr. Ochila for the Respondent, told this Court that the Respondent had filed his written Submissions, but on my perusal of the court record such a document could not be traced.



Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial Court, unlike the appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.
17. The duty of the first appellate Court was settled long ago in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the Court, held as follows;-
- “... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
18. Having said this, I have carefully considered this Appeal and the Cross Appeal in its entirety and the two key issues that emerge for my determination are;
- I. Whether the trial magistrate erred in the finding on liability.
- II. Whether the trial magistrate erred in arriving at his decision on quantum of damages.
19. Thus, as I address the issues here under, for ease of following, the cross appeal therein will be taken as the response to the Appellants appeal;
- Whether the learned trial magistrate erred in his finding on liability.
20. Section 107 [1] of the [Evidence Act](#), Cap 80 Laws of Kenya outlines the burden of proof as follows;
- “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.”
21. It then follows that, the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
22. It must be recalled that the duty to discharge the burden of proof in respect of negligence rests with the Plaintiff. In *Henderson v Harry E. Jenkins* {1969} 3 A.E.R. 756, the Court reasoned that:
- “In an action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving Judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails.” [See also *Veronica Kanorio Sabari v Chinese Technical Team for Kenya & 2 others* HCCC No. 376 of 1989 *Henry Mwobobia v Muthaira Karauri & Another* HCCC No. 104 of 1991]
- “The onus is on the plaintiff to prove this case on the legal standard necessary. In a civil case the standard is on a balance of probability.”
23. As discerned above, this appeal, is on re-assessment, re-evaluation and determination on whether the trial Court erred in apportioning liability, simply put, it is a reevaluation of who was to blame for the



accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR wherein the Court on this issue held that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.”

24. It is now necessary, in light of these principles, to reassess the evidence presented before the trial Court. The evidence on record clearly establishes that an accident occurred on 1st August 2020, involving the Respondent, who was a pillion passenger, resulting in injuries. This incident involved a collision between the Appellants motor vehicle, Registration Number KAS 687F, and the motorcycle, Registration Number KMFD 428R.
25. The Appellants contend that the motor cycle rider was carrying a pillion passenger and that contrary to traffic Rules, none of them had not worn any helmet.
26. Counsel for the Appellant submits that the motor cycle emerged from right side as the rider attempted to overtake their motor vehicle and, in the process, hit the motor vehicle as the rider attempted to avoid hitting the truck that was ahead of their motor vehicle, and an oncoming motor vehicle on the opposite lane. According to the Appellants, it was the evidence of DW1 that their motor vehicle was knocked on the front right-hand side and as per the availed inspection report, DEXH4, the motor vehicle was knocked on the front side and that it could not be true that the motor cycle was knocked from behind as alleged. The Appellants urged this Court to find the Respondent liable for the accident.
27. On the other hand, the Respondent testified that the motor vehicle was being driven behind the rider and that upon being hit from behind both the rider and his passenger were pushed off to the left of the tarmacked road. He insisted that the motorcycle rider was not overtaking as they were branching off onto a road that was on their left side when the motor vehicle hit them. On cross-examination, he insisted that they were heading towards Malaba and the Appellants motor vehicle was also heading towards Malaba and that they were ahead of the motor vehicle which knocked them from behind. PW3, No. 92067 P.C Godfrey Okeyo, testified that he was not the investigation officer in this incident and that he only had with him the police abstract that noted the accident was still under investigation.
28. In rendering its decision on liability, the trial Court held as follows:

“The plaintiff testified that he was riding on the motor cycle when the defendant’s driver lost control of the motor vehicle and hit them from behind.

The evidence of the plaintiff was not challenged as such I have no reason to doubt the evidence and I find the defendants 100% liable for the accident”
29. The burden of proof as per Section 107 [1], 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;

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



30. The Court of Appeal in *Micheal Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR held:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* [2] [1953] A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

31. On one hand the Appellants blame the Respondent for the accident whereas on the other hand the Respondent blames the Appellants for causing the said accident.

32. It is clear that PW3 who produced the police abstract which had a remark that the appellant was to blame. PW3 was not the investigating officer nor did he attend to the scene. Further neither the sketch plan measurements allegedly taken at the scene of the accident nor the police file were produced as exhibits to assist the Court to determine the point of impact. Without such evidence the Court cannot exactly tell who was to blame. In the case of *Benter Atieno Obonyo v Anne Nganga & Another* [2021] eKLR where the Court opined that:-

“First and foremost, there is no doubt that an accident occurred in which the appellant was injured. Hence, the only question is who caused the said accident? The appellant, PW1, on cross examination testified that she didn’t know who was to blame for the accident as she was only called and informed that her husband had been involved in the accident. She did not witness the accident. PW2 a police officer attached to Nakuru police station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigations. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for the accident. No police file and /or sketch map was produced to explain to the court how the accident occurred. Clearly, the appellant failed to prove her case on liability on a balance of probability as was held by the trial court. I place reliance on the case of *Sally Kibii & another v Francis Ogaro* [2012] eKLR where the court in upholding the lower court’s decision dismissing the appellant’s case stated that:

“In the *Kenital* case [above] I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The Plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating Police Officer. Proof of negligence was material in this case and the burden of proof was upon the Plaintiff. She did not discharge the burden and the appellant’s Counsel Submission before me that ‘someone, has to explain how the accident



took place, is telling. That ‘someone’ is the Plaintiff who alleges negligence on the part of the Defendant.”

33. While an abstract report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In *Peter Kanithi Kimunyu v Aden Guyo Haro* [2014] eKLR it was held that:-

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.”
34. Both the Appellants and Respondent herein, admit the occurrence of the accident. Their point of departure is how the accident occurred. In light of the contradicting and rival evidence of the parties, the court must decide culpability based on the credibility of the parties’ witnesses.
35. DW1, the 1st appellant testified that the vehicle’s brakes had failed and since there was a truck ahead of him he proceeded to indicate on the left side and that he had not seen any motorcycle approaching from behind and thus drove towards the left side of the road. The respondent on the other hand testified that the rider was in front of the appellants’ vehicle on the left side of the road as they had intended to divert to an off road on the left. I do find that the evidence of the respondent to be credible viz avis that of the 1st appellant who was the driver of the appellants’ motor vehicle. The fact that he admits that the brakes of their vehicle had failed is proof of the fact that the appellants’ vehicle was not roadworthy. The Appellants owed a duty of care to other road users and specifically the respondent herein. They failed to discharge that duty. I do therefore find that the 1st appellant was negligent in the manner that he drove motor vehicle registration No KAS 687F, make Toyota Corolla, which negligence caused the road traffic accident with the resultant bodily injuries and loss to the respondent.
36. It is noteworthy that the motorcycle rider was not a party to the suit, as he had neither been sued by the Respondent nor joined as a third party by the Appellants.
37. The failure to take-out third-party proceedings by the Appellants leads to the presumption that they were aware of their sole negligence.
38. Consequently, I uphold the trial Court’s finding on liability in favor of the Respondent, holding the Appellants liable for causation of the accident at 100%.

Whether the trial magistrate erred in arriving at his decision on quantum of damages.

39. On quantum, the approach of the Courts to such a situation like in the instant appeal is exemplified by the case of *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* CA No. 2 of 1986 KLR 730 wherein Nyarangi J.A stated that:

“an appellate Court does not interfere with quantum of damages simply because in its opinion the damages awarded is excessive, it only interferes if there is evidence. That the damages have been assessed on wrong grounds or are unreasonable.”
40. According to clinical officer, Mr. Adok, PW2, the Respondent was involved in a road traffic accident on 1st August 2020 and his injuries were graded as grievous harm as per the P3 form signed on 28th August 2020 and produced in Court as PEXH 2, the X-ray films done on 25th August 2020 which were produced in Court as PEXH 5 [a-c] and the discharge summary produced in Court as PEXH 6.



41. According to Dr. Wambasi Mutoro who testified as PW4 told the Court that he examined and prepared a medical report on 1st November 2020 of PW1, the Respondent herein. According to him, he observed that the Respondent was in fair general condition but with a wasted lower limb. He concluded that the Respondent experienced dramatic pain and that he had suffered grievous harm and his sustained injuries were yet to heal. He told the Court that the Respondent was expected to head back to surgery to remove the nails and his healing was expected to take long. It was in his report that he detailed the injuries sustained by the Respondent as: Multiple bruises both lower and upper limbs, open fracture tibia fibular, blunt chest trauma, blunt trauma to the back and massive skin loss. He also noted that the Respondent's current complains as: inability to use the left lower limbs and pains, and he the Respondent also complained of back pain and difficulty in sitting for a long time. He recommended that the Respondent will require surgical removal of the nail and continue with surgical checkups until complete healing is attained. He produced the medical report in Court as PEXH 7a.
42. The Appellant contends that the general damages awarded were excessive and that the special damages were neither pleaded nor proved.
43. I wish to state at the outset that the award of general damages is always at the discretion of the trial Court. However, this discretion must be exercised judiciously and in accordance with the law. The mandate of an appellate Court to interfere with damages awarded by a trial Court is limited; it is confined to specific circumstances which include that the award was either inordinately high or low, such that it reflects an erroneous estimate of the damage suffered; or if the trial Court considered irrelevant factors, omitted relevant ones, or applied incorrect legal principles in arriving at the award.
44. I have reviewed the authorities provided by both parties to the trial Court in support of their respective proposals on quantum. The Respondent relied on the decision of *Gabriel Mwashuma v Mohamed Sajjad & Another [2015] eKLR Civil Suit No. 79 of 2012* at Mombasa wherein an award of Kshs. 3,000,000/= was made under pain and suffering for similar injuries. On the other hand, the Appellants relied on the cases *Ruth Mosota Momanyi v Ruben Mosota Momanyi [2019] eKLR* and *S.D.V Transami K. Limited v Scholastica Nyambura [2012] eKLR*, arguing that Kshs. 250,000/= would be sufficient in these circumstances taking into account that the Respondent sustained soft tissue injuries as PW4 did not indicate in his report that the Respondent sustained a fracture.
45. Given the evidence on record, I find fault in the learned trial magistrate's award of Kshs 400,000/= as general damages for pain and suffering, considering the injuries sustained by the Respondent. In the case of *Harun Muyoma Boge v Daniel Agulo [2015] eKLR* where the Claimant suffered blunt chest injuries; cut wound right wrist; deep cut wound on the right foot; fracture right tibia and fibula and soft tissue injuries. The High Court set aside the award of Kshs. 150,000/= as general damages and substituted the award with Kshs. 300,000/=. In that case, judgement was rendered in 2015 and in the appeal before me the accident occurred in 2020. Bearing in mind the current inflation, I set aside the award of the learned trial magistrate and substitute it with an award of Kshs.800, 000/= as the same is reasonable in the circumstances.
46. Regarding the award of special damages, the Appellants contends that these damages were neither pleaded nor proved by the Respondent and that the National Health Insurance Fund was used to offset the medical Bills However, upon reviewing the pleadings, I disagree with the Appellant's submissions as it is clear the Respondent had pleaded particulars of special damages in the Plaintiff. I have carefully evaluated the Plaintiff and note that the Respondent at paragraph 8 listed the particulars of special damages as follows:
 - a. Police abstract Kshs. 500/=



- b. P3 form Kshs. 500/=
- c. Medical Report Kshs. 3,000/=
- d. Medical expenses Kshs. 227,283/=
- e. Receipt for copy of records Kshs. 550/=

Total Kshs. 231,833/=

47. Special damages pleaded amounted to Kshs. 231,833/= and there was no basis for the trial magistrate to award Kshs. 230,833/= as special damages. According to the final Summary invoice no. IP-INV37482 printed by Bungoma County Referral Hospital, the total bill was Kshs 225,223/= and the same was settled by NHIF, this bill included Kshs. 227,283 pleaded as special damages. The Court in *John Mwangi Munyiri & another v Paul Wachira Njuguna* [2020] eKLR in been settled by NHIF stated as follows:

“Whether the respondent was entitled to the special damages of Kshs.111,255/-. In the plaint, the respondent claimed special damages of Kshs.111,455 and further medical expenses of Kshs.12,215/-. I agree with counsels submission That the Respondent having admitted. That Kshs.107,800/- which he incurred in medical expenses for treatment and admission, were paid by NHIF, just like any monies paid by any insurance, the respondent could not be compensated for it again. Section 43 of NHIF Act provides as follows

“Recovery of compensation or damages where a contributor to the Fund is entitled, whether under the Workmen’s Compensation Act [Cap.236] or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages have been recovered, be repaid to the Board: Provided That the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages.”

It follows That if any sums paid by the Fund to the hospital were again paid to the respondent as compensation, then it is recoverable by the Fund. The respondent was therefore not entitled to claim the Kshs.107,800/- which had been paid to the Hospital by NHIF. It would amount to unjust enrichment to claim it.”

48. The respondent cannot claim for the monies paid by NHIF towards his medical bill and this would amount to unjust enrichment. For some, the Respondent had receipts, but the Appellants submitted that special damages should only be awarded if proven by receipts in compliance with the [Stamp Duty Act](#). They averred that the receipts were inadmissible because they bore no revenue stamps.
49. On the matter of stamp duty, specifically on the question of admissibility of receipts, where the revenue or duty stamp has not been affixed, the Courts have addressed the same severally. In the case of *George Kigamba v Buuri Dairy Farmers Co-operative Society* [2018]eKLR the court was of a contrary view. In that case, Gikonyo J. held:

“Applying the test of law, the learned trial magistrate was clearly in error in rejecting the receipts without giving the Appellant an opportunity to have the receipts stamped and to pay penalties attendant thereto as provided in the [Stamp Duty Act](#). Non-compliance



thereof does not per se invalidate or render the receipts herein inadmissible in evidence. The Appellant ought to have been given an opportunity to comply or pay the requisite penalty. The Appellant proved that his vehicle was involved in an accident and was damaged as a result; he repaired it and incurred expenses which he paid.”

50. The finding of the Court in the above matter was informed by the decision of the Court of Appeal in *Paul N.Njoroge v Abdul Sabuni Sabonyo* [2015]eKLR where the Court held as follows:

“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:

“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: -

“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:

“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.”

51. The decision by the Court of Appeal is binding on this Court as well as the trial Court. Whereas the Respondent had not complied with the Stamp Duty Act, the trial court had not given him an opportunity to pay the requisite stamp duty and penalty prescribed under the Act. Consequently, I find that the Respondent specifically pleaded and only proved special damages of Kshs. 4,550/=.
52. As regard to future medical expenses, the pleadings confirm that the Respondent pleaded future medical expenses for limping gait, expenses on the ORIF management and removal of the screws and plates at the fracture site and loss of amenities. Guided by the case of Mburu & another v Kinge [Civil Appeal 277 of 2023] [2024] KEHC 1889 [KLR] [29 February 2024] [Judgment] while quoting the Court of Appeal in the case of Tracom Limited & Another v Hassan Mohammed Adan [2009] eKLR it was stated:-

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma [2004] 1 EA 91, this Court stated:-And as regards future medication [physiotherapy] the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as raising naturally from infringement of a person’s legal right should be pleaded.

We understand that to mean that once the plaintiff pleads that there would need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where treatment is undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think that will be necessary to plead [if it has to be pleaded at all] is the approximate sum of money that the future medical expenses will require. [emphasis added].”

53. It is noted that the medical report contained in the Respondent’s list of documents by Dr. Wamasi Mutoro opined that the Respondent will require to go for surgical removal of the exofits and continue with surgical clinic checkups until complete healing is achieved, but the said medical report did not provide for the estimated or exact cost for the future medical expense. Whereas in this case the Respondent did plead the same, he failed to put a figure on the estimated future medical costs. The medical report by doctor Wambasi Mutoro did not contain the said estimates either. That notwithstanding this court takes judicial notice of the fact that the respondent will incur future medical costs for the remail of the implants and I thus award the respondent a sum of ksh 150,000 on the account, which sum can reasonably meet such costs in a public hospital.
54. For the foregoing reasons, I find merit in the Appellant’s appeal, to the extent that the special damages of Kshs. 230,833/= is hereby set aside and substituted with a special damages of Kshs. 4, 550/= as strictly proved. I find merit in the cross-appeal, to the extent that the award of general damages of Kshs



400, 000/= is hereby set aside and substituted with an award of Kshs 800, 000/= and future medical costs of ksh 150,000 are awarded. The cross-appeal on the quantum of damages succeeds.

55. In the result, I set aside the judgment of the trial Court and substitute it with the following:

- a. Judgment in favour of the Respondent against the Appellants in the total sum of Kshs.800,000/=as general damages for pain and suffering.
- b. Kshs 4, 550/= as special damages.
- c. Ksh 150,000 as future medical costs.
- d. The Appellants shall bear the Respondent’s costs in the lower Court suit while each party shall bear its own costs of this appeal.
- e. The amount shall attract interest at Court rates from date of judgment of the lower Court until full payment.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

.....FOR APPELLANTS

.....FOR RESPONDENT

.....COURT ASSISTANT

