REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 37 OF 2019

AWILI NELSON..... APPELLANT

VERSUS

PURITY ACHIENG OCHIENG ..... RESPONDENT

(Appeal against judgment and decree of Hon.T.M.Olando, SRM in Siaya PM Civil Suit No. 81 of 2016

delivered on 24th July, 2019)

JUDGMENT

1. This judgment determines the Appellant's memorandum and grounds of appeal dated 8th August 2019, lodged before this Court on 19th August 2019. The Appellant is **Awili Nelson**. He was the Defendant in the **Principal Magistrate's Court at Siaya in Civil Suit No. 81 of 2016** wherein he was sued by the Respondent herein **Purity Achieng Ochieng**. The Respondent's claim against the Appellant in the said suit was vide Plaint dated 9th December 2016, which Plaint was taken amended vide an amended Plaint dated 9th July 2018.

2. In the said amended plaint which was filed on 11.7.2018, the Respondent's claim against the Appellant was for:

   a) General damages for pain and suffering and loss of amenities;

   b) General damages for loss of earning capacity and loss of earnings;

   c) Future medical expenses KShs.500,000/=;

   d) Special damages KShs.125,260;

   e) Costs of the suit;

   f) Interest on all a – e above at court's rate.

3. The claim arose form a road traffic accident which occurred on 26th December, 2015 off Siaya – Rangala Road involving the Respondent Pedestrian and the Appellant's motor vehicle Registration number KBS126X. The Respondent claimed that the Appellant's motor vehicle was negligently driven as a result of which the driver thereof who was the Appellant's agent or servant lost control and went off the road and knocked the Respondent thereby occasioning her serious injuries, loss and damage.

4. Despite the Appellant filing amended defence dated 8th August 2018, denying liability and any loss or damage as claimed by the Respondent, Parties negotiated and agreed on liability at 80% against the Appellant and 20% against the Respondent. This was vide a consent recorded by the court from both Parties' Counsel on 27.2.2019.

Following the consent on liability being recorded, the suit proceeded to hearing to determine quantum of damages payable to the Respondent/plaintiff.

5. The evidence adduced by the Respondent regarding what injuries she sustained and what loss and damage that she suffered was as per her signed witness statement filed in court and reiterating her said pleaded injuries in **paragraph 5, 5A, 53 and 6** of the amended plaint. The Plaintiff claimed that following the material accident, she sustained the following injuries:

   (i) Multiple fractures of the right lower limb;

(ii) Commuted fractures of the right leg femur bone;

(iii) Fragmented/commuted fractures of the tibia/fibula bones of the right leg with malunion;

(iv) Loss of bone on the right leg tibia bone;

(v) Degloving wound on the right leg;

(vi) Multiple deep cuts on the right lower;

(vii) Deep wound on the right heel;

(viii) Multiple fractures on the right lower limb;

(ix) Mal-union and osteopenia on the tibia;

(x) Proximal fibula shaft fracture;

(xi)Chest pain.

6. The Plaintiff/Respondent also prayed for KShs.500,000/= for future medical expenses as she suffered 80% permanent incapacitation. She also claimed that she was a tailor and as a result of the accident and injuries suffered, she lost her earnings and earning capacity. She claimed that she used to earn KShs.9,000/= net profit from her tailoring business. She further claimed for medical expenses of KShs122,260 and KShs.3,000/= for medical Report.

7. The Plaintiff/Respondent's Witness Statement outlining the above injuries was adopted as her evidence in chief. She also produced Hospital Treatment Notes, Discharge Summaries, X-ray Reports, Medical Reports, P3 forms, Police Abstract, Receipts in Support of Special Damages and Demand Letter.

8. The Respondent claimed in her testimony that she had pain on the leg and she could not stand up. She prayed for damages and expenses and future medical expenses plus costs and interest.

9. In cross-examination by Mr. Karanja Counsel for the appellant herein, she stated that she had 4 fractures on the right leg while the lower part had three fractures, on the knee, in the middle and on the lower part. She stated that she had a metal fixed at the frames which was still there and that she had undergone tissue grafting. She also saw Dr. Odondi whose medical report was produced as exhibit by consent. She stated that she could no longer work as a tailor because of the injured leg. She stated that she had not healed and had not gone for further treatment as she had no money.

10. She gave additional evidence as per the amended Plaint and produced more documents. She stated in cross-examination that she had not gone to a college training as a tailor but she had trained under someone.

11. She stated that she used to earn KShs.9,000/= per month and that she used to deposit the money into a bank but she had no evidence for the deposits. She also had no evidence that she used to pay taxes. She maintained her testimony that she needed KShs.500,000/= for future medical expenses.

12. Kennedy Onyango the husband to the Respondent testified as PW2 and had his witness statement adopted as evidence in Chief. He testified that the Respondent who was his wife as per the marriage certificate produced as exhibit, that she was a tailor earning KShs.9,000/= per day and now she could do nothing after the accident. He produced business permit and licences for a boutique registered in his name.

13. On 12.7.2019, the Parties had by consent, the medical Reports of Doctor Okombo and Doctor Odondi produced as exhibits.

14. Parties' advocates then closed their respective cases and filed written submissions for consideration and determination by Hon. T.M. Olando, Senior Resident Magistrate.

15. The Respondent had prayed for damages as follows:

(i) Pain and suffering: - KShs.2,500,000.00

(ii) Loss of earning capacity - KShs.2,000,000.00

(iii) Loss of future earnings - KShs.4,388,860.80

(iv) Future medical expenses - KShs. 500,000.00

(v) Special damages - KShs. 125,260.00

Total **KShs.9,514,120.80**

Less 20% Contribution **KShs.1,902,824.16**

Net total **KShs.7,611,296.64**

Plus costs and interest.

16. On the part of the Appellant, it was submitted that the Plaintiff/Respondent was only entitled to damages as follows:

(a) Pain and Suffering - KShs.600,000.00

(b) Lost/loss of earnings - Nil

(c) Loss of future earnings - KShs.841,536.00

(d) Future medical expenses - Nil

(e) Special damages - KShs.125,260.00

Less 20% contribution

17. The appellant's Counsel argued with the support of case law that loss/lost earnings is a special damage which required to be pleaded with certainty and particularity. He relied on the cases of **Abson motors Limited Versus Dominic B. Onyango Kondili [2018] eKLR; and Bagine Vs. Martin Bundi [1997] e KLR; Ouma Versus Nairobi City Council [1976] KLR 309.**

18. On loss of future earning capacity, he submitted that as there was no evidence of the business of tailoring and actual earnings by the plaintiff, the court could not rely on the claim that she earned KShs.9,000/=. He urged the court to adopt KShs.5,844.20 as set out in the **Regulation of Wages [General Amendment] Order, 2015** being income or wages for a general worker. He urged that a multiplier of 15 years and not 30 years be adopted, as supported by several authorities.

19. On the claim for future medical expenses, it was submitted that the plaintiff was not entitled to anything for want of proof in that Dr. Okombo who proposed the figure in his medical Report was not a surgeon hence he could not assess the cost of future treatment. Reliance was placed on **Akamba Public Road Services Vs. Abdikadir Adan Galgalo [2010] and Penina Mboje Mwabili Versus Kenya Power and Lighting Company Limited [2016]Eklr.** Further, that Doctor Odondi did not State in his medical report that there was need for future medical treatment yet he was a consultant surgeon.

20. In his judgment delivered on 24.7.2019, which is impugned, Hon. T. M. Olando, SRM, awarded the Respondent damages as follows; after listing the injuries sustained by the respondent herein as stated in the medical Reports by Dr. Okombo and Dr. Odondi:

Pain and Suffering - KShs.1,400,000.00

Future medical expenses - KShs. 500,000.00

Loss of earnings and future

Earnings capacity

Using - KShs. 5,844.20

Month earnings x 31 years as

she was aged 27 years = KShs.1,739,233.90

Special damages - KShs. 125,260.00

Total **KShs.3,764,493.90**

Less 20% contribution **KShs. 752,898.70**

Net balance **KShs.3,011,595.10**

Plus costs and interest.

21. It is the above judgment that the appellant was aggrieved by, giving rise to this appeal. In the memorandum of appeal dated 8.8.2019 and filed in court on 19.8.2019, the appellant laments that:

1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.

2. The Learned trial Magistrate completely ignored and did not once refer to the Appellant's submissions and especially the precedents on general damages cited therein.

3. The Learned trial Magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages, namely that like cases attract similar award and ignoring completely the Appellant's submissions thereon.

4. The quantum of damages for loss of future earning capacity is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.

5. The Learned trial Magistrate completely ignored and did not at all refer to or consider the Appellant's submissions and especially the precedents on the multiplier, cited therein.

6. The Learned trial Magistrate erred in law when he held without any reference to any precedent or legal basis that the multiplier applicable was 31 years and then proceedings to award damages for loss of earning capacity based on that arbitrary multiplier.

7. The Learned Magistrate erred in Law and fact in awarding the Respondent herein a sum for future medical expenses when the need for such treatment was not established on the evidence.

The Appellant prayed that this appeal be allowed and for orders that:

a) The judgment and decree be set aside or otherwise varied.

b) The quantum of general damages for pain and suffering and loss of amenities be set aside, varied and or be substituted with a suitable award.

c) The quantum of general damages for loss of future earning capacity be set aside; varied and of be substituted will a suitable award.

d) The quantum of general damages for future medical expenses be set aside.

e) The costs of the appeal be paid by the Respondent to the Appellant.

22. The appeal herein was canvassed by way of written submissions. The appellant's Counsel filed written submission dated 2.12.2020 whereas the Respondent's Counsel filed written submissions dated 5.2.2021.

23. In summary, the respective parties' advocates supported their respective positions with the appellant urging the court to allow the appeal whereas the respondent's counsel urged the court to uphold the judgment of the lower court.

24. I have deliberately omitted the submissions in this judgment for the reasons that I shall give in my determination.

DETERMINATION

25. I have considered the appellant's appeal, the evidence adduced in the trial court, and submissions for and against the appeal. In my humble view, the following issues flow for determination on quantum of damages alone.

(1) Whether the trial court erred in principle in delivering a judgment and making awards without giving reasons thereof.

(2) Whether the trial court erred in principle in making an award for pain and suffering and loss of amenities, not comparable to awards made in similar cases with similar injuries.

(3) Whether the Respondent was entitled to loss of earning capacity using a multiplier given by the trial court and whether that multiplier was comparable to awards in similar cases with similar cases.

(4) Whether the Respondent was entitled to the award for future medical expenses and whether she proved the said claim.

26. On the first issue which this court considers to be the core issue and which, should the court find in the affirmative, might determine this appeal in limine, the Appellant's Counsel submitted in contention that the trial court did not lay a basis or give reasons for awarding the Respondent general damages of KShs.1,400,000/= for pain, suffering and loss of amenities. In his view, the judgment failed to meet the threshold for judgment as stipulated in **Order 21 Rule 4 of the Civil Procedure Rules** on what judgment should comprise of i.e. concise statement of the case, points for determination, the decision thereon and the reasons for the decision.

27. The Respondent's Counsel contends that the judgment being on quantum alone, the trial court gave a concise statement of the case before delivering into quantum of damages payable in each of the headings by referring to the medical reports for the two doctors, the injuries sustained by the plaintiff and submissions guided by the authority of **Osman Mohamed and Another vs Saluro – Bandit Mohamed and Kornelius Kweya Ebichet V C & P Shoe Industries Ltd and John Manuthu Maing**i, before awarding the Plaintiff KShs.1,400,000/=. On loss of earning capacity, it was submitted that the trial Court considered the age of the Respondent before applying the Multiplier of 31 years hence he gave reasons for the quantum arrived at.

28. I have perused the brief judgment of Hon. T. M. Olando which was basically on quantum of damages payable to the Plaintiff/Respondent herein since liability had already been agreed upon. The question is whether that judgment meets the requirements of Order 21 Rule 4 of the Civil Procedure Rules.

29. It is true that judgment must comply with **Order 21 Rule 4 of the Civil Procedure Rules** which provides that:

> ***"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof."***

30. Examining the judgment as impugned, the same was only against quantum of damages awardable as liability had been agreed upon. The trial Magistrate made on page 1 of his judgment the following statement.

> **"Pleadings**
>
> ***The Plaintiff filed this suit on 14.12.2016 seeking for the following orders:***
>
> ***a) General damages.***
>
> ***b) Special damages KShs.125,260.***
>
> ***c) Costs and interest of the Siaya.***

31. He then proceeded to state that ***"Liability was agreed at 80%: 20% in favour of the Plaintiff. Judgment is thus entered for the Plaintiff against the defendant as follows….. Liability was agreed at 80% to 20% in favour of the plaintiff…."***

32. Examining that statement by the trial magistrate, it was concise enough.

33. On the points for determination, the trial Magistrate stated that liability having been agreed upon at 80% to 20% in favour of the Plaintiff and having proceeded to enter judgment as agreed on liability, the trial Magistrate then stated: "quantum: Under Pain and suffering", he enumerated to the injuries sustained by the Plaintiff, referred to the 2 medical reports admitted in evidence by consent and was guided by the principle in the 2 cited cases of **Osman Mohamed and Another Vs. Saluro Bandit Mohammed and Korelus Kweya Ebichet Vs C & P Shoe Industries Ltd** and Another before awarding damages for pain and suffering.

34. He also awarded the claim for future medical expenses KShs.500,000/= stating as per the medical Reports and finally, loss of earning capacity, giving the basis as submitted by the Defendant's Counsel and rejecting the earnings suggested by the Plaintiff's Counsel in his submissions. He then applied a Multiplier of 31 years.

35. From the above brief judgment, I am not satisfied that the trial Magistrate gave the points for determination and reasons thereof, noting that the appellant's counsel vehemently submitted against each of the items on quantum and therefore it was important that the trial court gives reasons why he awarded the damages as prayed and why he could not consider the opposing submissions by the appellant's counsel. The trial court's judgment was too scanty on quantum yet various headings were fiercely defended and contested. This cannot be said to be merely a style in judgment writing adopted by the trial Magistrate. It is materially failing to adhere to the substance of the case which is the reasons for the decision. See **South Nyanza Co. Ltd vs Omwando Omwando [2011] eKLR Makhandia – J.** ***(as he then was)***.

36. In **Soulemezes Vs. Dudley Holdings [1987] 10 N S W L R 247**, it was stated:

> ***"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge's decision. As Lord Mackmillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice."***

37. **In "The writing of Judgments [1948] 26 Canadian Bar Review at 491**" it is stated thus, the articulation of reasons provides the foundation for acceptability of the decision by the parties and by the public and Secondly, the giving of reason furthers Judicial accountability. As Professor Shapiro recently stated **(In Defence of Judicial Candour [1989] 100 Harvard Law Review 731 at 737 thus:**

"…… A requirement that judges give reasons or their decision, grounds of the decision that can be debated, attacked and defended serves 9 vital functions in constraining the Judiciary's exercise of Power."

38. In **Black's Law Dictionary, 5th Edition,** "***Judgment***" is defined as:

"The official and authentic decision of a Court of Justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."

I can't agree more.

39. **Nyakundi J in Joseph Karisa Baya vs Cefis Georgio and Another [2020] eKLR** persuasively stated as follows, after citing the above authorities for which I credit him for:

"Courts are also alive to the fact that the onus of interpreting every Constitutional provisions and Acts of Parliament is vested with the Judiciary under Article 159 of the Constitution.

To determine parameters of a dispute upon evaluation of the evidence on record for completeness and exhaustiveness, reasons for the decision is the norm rather than the exception. Clearly implying that the court or tribunal in granting or rejecting the claim has to set down the facts, general principles and the reasons for the decision. It is often considered that a judgment given in absence of points for determination offends the basic principle of natural justice. The requirements are that the parties should know the reasons for and against the decision."

40. The Learned Judge then adopted the observations made by **Makhandia J in South Nyanza Sugar Co. Ltd vs Omwando Omwando (Supra) where the Leaned Judge stated:**

"In a rather skimpy superficial and one page judgment, the trial Magistrate held: "…I have carefully appraised the evidence on record. On a balance of probabilities, I believe the plaintiff was injured. He produced a delivery note in the name of the defendant bearing his name. The contractor was never enjoined as a party. I hold the defendant liable. I will however apportion liability at 80% to 20% in favour of the plaintiff. In view of the injury sustained and considering that it healed well, I will assess general damages at Kshs.80,000/- which will work down to Kshs.64,000/-. The plaintiff has exhibited a receipt for Kshs.3,000/- in support of the specials. I will award this sum…"

I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal.

41. Agreeably, reasons for judgments or decisions manifest both transparency and accountability.

42. In **Taggart Review Administrative Law [2001] New Zealand Law Review 439 and Lewis vs Wilson and Horton Ltd (2000) 3 New Zealand Law Review 546**, it was stated:

"It was observed that reasons provide a dispute for the judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of Justice. In the present, it is hard to believe that the Judge would have granted the Order if he had formally marshalled his reasons for doing so. The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the Judge and satisfied the task human demand of those affected by judicial action to be told why. In this way, a losing litigant may be able to accept the decision. The statement of reasons connects the decision to criteria external to the Judge and enhances the fairness of the process as well as demonstrating the rationality of the process."

43. See also **Grollo Vs. Palmer [1995] 184 CLR 348 and Wainohu 2011 CLR 181, 214 and AA vs BB [2013] ALR 353** cited by Nyakundi – J. in the cited case of **Joseph Karisa Baya vs Cefis Georgio and Another** (supra) ***and Flanner vs Halifaz Agencies Ltd [2001] All ER 273.***

44. From the above authorities and my assessment of the judgment of the learned trial Magistrate, I am satisfied that the judgment is too scanty and fell short of the requirements of **Order 21 Rule 4 of the Civil Procedure Rules** and therefore such a judgment cannot stand. See **Cosmas Maweliwe Wepukhulu v Sameer Africa Limited (Previously Known as Firestone East Africa (1969) Limited [2018] e KLR** where the Court of Appeal faulted the High Court for determining only one issue out of the 18 issues framed by the parties. The Court of Appeal stated as follows when referring back the case to the High Court for rehearing before a different Judge:

"The question that falls for our determination is whether the honourable trial judge addressed his mind to the 19 issues agreed by the parties for his determination. And secondly whether he was entitled to determine the dispute on a single and isolated issue.

In answering the first question it is clear from our reading of the judgment that the honourable trial judge decided the dispute on the single issue of discharge voucher dated 22/8/2006 signed by the appellant in the presence of his wife. The trial judge was of the view that the appellant was not entitled to any more payment after executing a discharge voucher. In essence the judge was of the position that the discharge voucher signed by the appellant, released the respondent of any further liability.

In our humble view the parties framed 19 issues for determination before the trial judge. As a matter of good order and procedure the parties were entitled to an answer to each of the 19 issues set for determination, notwithstanding the contents and style employed by the judge. That was not done, which in essence means that the trial judge failed to consider material and fundamental aspects of the dispute between the parties. Respectfully we think the trial judge fell into an error, which clearly vitiates the judgment subject of this appeal. Consequently the failure and/or omission to consider 18 issues goes to the root of the judgment, which we cannot allow to stand.

We therefore agree with the counsel for the appellant that indeed the court erred in considering only the issue of the discharge voucher. From the excerpt of the judgment which we have underlined above it is clear that according to the learned judge the issue of the discharge was the crux of the case and held the key to success or failure of the appellant's case. We respectfully disagree with the learned judge and hold that the learned judge should have considered the other issues raised by the parties, in arriving at its final decision.

The upshot of the above is that it would be proper to refer this case back to the superior court for re-trial. Rule 31 of this Court's rules gives us power to do so. It provides:

"On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs…."

45. This court being a first appellate court has jurisdiction **Under Section 78 of the Civil Procedure Act** to:

(a) Determine the case finally;

(b) Remand a case;

(c) Frame issues and refer them for trial;

(d) Take additional evidence or to require the evidence to be taken;

(e) To order a new trial.

2. ***Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and impose by this Act on courts of original jurisdiction in respect of suits instituted therein."***

46. The question is whether this court should invoke section 78 of the Civil Procedure Act to rewrite the Judgment which was not written in accordance with Order 21 Rule 4 of the Civil Procedure Rules. A similar situation arose in **Timsales Limited v Samuel Kamore Kihara [2016] eKLR** where the High Court upon finding that the lower court did not comply with the provisions of section 25 of the Civil Procedure Act and Order 21 Rule 4 of the Civil Procedure Rules elaborately stated:

" The learned judge in resolving the issues in controversy before him took into consideration the pleadings, evidence tendered by either side as well as their respective submissions, and faulted the trial magistrate for rendering a ruling instead of a judgment. The learned judge correctly held the view that there was a clear duty and obligation on a trial court under section 25 of the Civil Procedure Act, to write a judgment in accordance with the prescriptions set out in Order xx rules (4) of the Civil Procedure Rules, as it was then. He further held that since the suit had been defended, (a judgment thereon ought to have contained a concise statement of the case, the point(s) for determination, the decision thereon and the reasons for such decision. He then arrived at the following conclusion:-

"The ruling by Hon. Onditi was not a judgment in terms of either sections 25 of the Act or Order xx rule 4 of the rules under the Act. In the circumstances, that ruling is set aside, and vacated together with any orders herein. The appeal herein does therefore succeed to that extent."

" Instead of remitting the matter to the trial court for action as prayed for by the appellant, the learned judge made the following observations on the way forward:-

"Contrary to the prayer in the memorandum of appeal to remit this case to the lower court for hearing *de novo*, ***Mr. Martin, invited this court to write a judgment pursuant to the provisions of section 78 of the Civil Procedure Act."***

The learned Judge then took note of the provisions of section* 78 (1)** ***(a) *and* ***2*** *of the* ***Civil Procedure Act*** *and made an observation thus:-*

"This case was filed on 11th February, 2003, that is some eight years old. The parties adduced and closed their respective cases. An order for re-trial would be an occasion to allow the parties to fill gaps in their clings of armour, and that would be clearly prejudicial in particular to the appellant which claims that the respondent's suit ought to have been dismissed in the first place. The discretion which easily lends itself for adoption is to determine the suit finally as provided by section 78 (1) (a) of the Act."

He then assumed the role of the subordinate court, interrogated the issues in controversy as between the parties and then rendered a merit judgment thereon.

The issue for our determination is whether the learned judge properly exercised his jurisdiction under the said provision.

"78 (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

2. Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and impose by this Act on courts of original jurisdiction in respect of suits instituted therein."

Mr. Terer took no issue with the learned Judge's decision of assuming the role of the subordinate court to finally determine the issues in controversy as between the parties then litigating before the subordinate court. Mr. Gekonga similarly avoided the issue and made no mention of it. He submitted that parties have no mandate to confer jurisdiction on any court. It has to be conferred by law.

That is indeed the position as affirmed by this Court in the case of Owners of the Motor Vessels "Lilian S" versus Caltex Oil (Kenya) Ltd [1989] KLR 1 where the issued jurisdiction was discussed thus:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.If the jurisdiction of an interior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.Jurisdiction must be acquired before judgment is given"

There is no dispute that the learned Judge had jurisdiction to hear an appeal from the subordinate court as contained in the memorandum of appeal and grant the prayers which simply sought the setting aside of the ruling of Hon. Onditi and refer of the matter back to the subordinate court for the writing of the judgment.

The issue is whether the omnibus prayer: "such other Order as the court may deem fit to grant" provides a basis for the Judge to assume the original jurisdiction of the trial magistrate.

In Rex Hotel Ltd versus Jubilee Insurance Co. Ltd [1972] EA 211 the predecessor of this Court was categorical that a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief sought. In the absence of a judgment there is no way the learned Judge could have become seized of the appeal on the basis of the pleadings and evidence before the subordinate court, let alone have an opportunity to review any assessment done by the trial magistrate to enable him to invoke, reassess and reanalyze both facts and pleadings and arrive at his own conclusion on the matter under section 78 (1) and (2) of the Civil Procedure Act.

With respect to the learned Judge, the enthusiasm for speedy dispensation of justice gave no licence to over step the boundaries delineated by the law and procedure.In our view, the learned Judge's invitation to interfere was limited to setting aside an irregular order as he correctly so found and then remit the matter to the subordinate court to perform the function it had shied away from performing under section 25 of the Civil Procedure Act and Order 20 (now 21) rule 4 of the Civil Procedure Rules and no more.

The learned Judge could not, in our view, take refuge under the relief "such other order as the court may deem fit to grant" because as observed by the predecessor of this Court, in the Rex Hotel Ltd case (supra) the role of the appellate court assuming the role of the trial court to reassess the pleadings, evidence and submissions of either side and arrive at its own conclusions on the matter was not consequential to the reliefs that the appellant had sought from the appellate Court.

In the result and for the reasons given above we affirm the learned Judge's order setting aside the orders of Hon. Onditi SRM of 2nd June, 2006 as these were irregular. We however set aside the learned Judge's orders that he had jurisdiction to finally determine the issues in controversy as between the parties under section 78 (1) and (2) of the Civil Procedure Act and substitute it with an order that the matter be remitted back to the subordinate court to proceed according to law. Since the appellate proceedings were occasioned by errors on the part of the court, we direct that each party do meet its own costs. The matter shall forthwith be placed before any magistrate other than Hon. Onditi SRM for disposal on priority basis."

47. In the instant case, it is clear from the brief judgment that the trial court did not write a judgment on quantum that meets the threshold of Order 21 Rule 4 of the Civil Procedure Rules. That being the case, there is no judgment which this court can consider. It would not even serve the interests of justice for the respondent/plaintiff who appears to have been seriously injured if this court was to uphold such a judgment and awards made without considering the issues raised by the appellant in his submissions and reasons why the trial magistrate had to decide the way he did.

48. The defective judgment is accordingly set aside and vacated and substituted with an order that the file be remitted back to the Siaya Senior Principal Magistrate's Court for a fresh judgment writing on the basis of the evidence adduced on record and in accordance with the law as stipulated in Order 21 Rule 4 of the Civil Procedure Rules.

49. Having set aside the judgment on account of non-compliance with Order 21 Rule 4 of the Civil Procedure Rules, I need not consider the other issues and grounds of appeal, as the said issues shall form the substratum of the judgment to be rewritten by the trial court in accordance with the law.

50. As Hon T. M. Olando is no longer in the station, I direct that any other Magistrate with jurisdiction in the court station to write and pronounce the judgment and deliver it to the parties on priority basis.

51. The matter to be mentioned before the Senior Principal Magistrate for directions on13/4/2021.

52. On costs, since these proceedings were occasioned by errors on the part of the trial court, I direct that each party do bear its own costs.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF MARCH, 2021 VIRTUALLY TO BOTH COUNSEL FOR THE PARTIES, MR. PETER KARANJA FOR THE APPELLANT AND MS. ABIR FOR RESPONDENT PRESENT.

R.E.ABURILI

JUDGE

CA: Modestar and Mboya