REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 143 OF 2017

COLOUR PRINT LIMITED.....1ST APPELLANT

CHARLES GISORE MARITA.....2ND APPELLANT

VERSUS

SIMON ODONGO OTIENO.....RESPONDENT

(Being an appeal from the Judgment of Mmasi SPM delivered on 2nd March 2017

in Nairobi Milimani Chief Magistrate's Court Civil Case No. 5154 of 2012.)

JUDGMENT

1. By his amended plaint filed on 4th April, 2013 **Simon Odongo Otieno**, (hereafter the Respondent) sued **Colour Print Limited** and **Charles Gisore Marita**, (hereafter the 1st and 2nd Appellants). The 3rd Defendant was **Car & General (Trading) Limited** but the case against them was withdrawn on 3.11.15. The Respondent's claim was for damages in respect of injuries he allegedly sustained while lawfully crossing Mombasa Road**,** Nairobi on 19th July 2011, following a collision with the motorcycle registration number **KMCF 398E** owned by the 1st Appellant**,** and at the time driven by the 2nd Appellant, the 1st Appellant's driver, employee, servant and /or agent. He averred that the 2nd Appellant drove, managed and or controlled the subject motorcycle so negligently and or recklessly that he caused it to knock down the Respondent. That as a result he sustained severe injuries, suffered pain and loss of amenities. The Respondent pleaded vicarious liability against the 1st Appellant.

2. The Appellants filed an amended statement of defence on 4th February, 2016 denying the key averments in the amended plaint and liability. Alternatively, the Appellants pleaded contributory negligence against the Respondent. The suit proceeded to a full hearing wherein both parties adduced evidence. In its judgment, the trial court found in the Respondent's favour and held both Appellants 100% liable jointly and severally for the accident. The court awarded damages in the total sum of Kshs. 1,829,293/-, made up as follows:

a. General damages for pain and suffering and loss of amenities: Shs. 1000,000/-;

b. Future Medical Expenses: Shs. 500,000/-;

c. Loss of Earnings: Shs.300,000/-;

d. Special Damages:Shs 29,293/-.

3. Aggrieved with the outcome, the Appellants preferred this appeal. The Memorandum of Appeal raises grounds of appeal as follows: -

1. The learned trial magistrate erred in fact and law by holding the Appellants wholly liable for the subject accident which finding was against the weight of the evidence.

2. The learned trial magistrate erred in fact and in law by failing to appreciate that the Respondent's oral testimony adduced

at the trial contradicted his written and filed statement making him a totally unreliable witness.

3. The learned trial magistrate erred in fact and in law by failing to adequately consider the evidence tendered by the Appellants demonstrating that the Respondent was wholly or very substantially to blame for the subject accident in that he recklessly dashed onto the busy Mombasa Road without first ascertaining if it was safe to do so.

4. The Learned trial magistrate erred in fact and in law by failing to appreciate that the Respondent was the author of his misfortune by crossing a road in a place where there is no pedestrian crossing.

5. The learned trial magistrate erred in fact and in law by failing to analyze the evidence on record and explain her liability finding.

6. The learned trial magistrate's award of general damages for pain, suffering and loss of amenities is so manifestly excessive as to amount to erroneous estimate of damages due to the Respondent.

7. The learned trial magistrate's award of general damages for future medical expenses is so manifestly excessive as to amount to erroneous estimate of the damages due to the Respondent.

8. The learned trial magistrate erred in both fact and law by awarding as damages for future medical expenses an amount neither specifically quantified in the plaint nor supported by any evidence on record.

9. In assessing costs of future medical expenses, the learned trial magistrate erred both in law and fact by completely ignoring the medical report by Dr. Moses Kinuthia and Dr. Ashwin Madhiwala (produced in evidence by consent) which estimates future medical expenses at Kshs. 250,000/- and Kshs. 150,000/- respectively amounts less than that awarded by the trial court.

10. The learned trial magistrate erred in adopting wrong principles in awarding future medical expenses that were not proved.

11. The learned trial magistrate erred in both law and fact by failing to appreciate that the Respondent did not specifically plead and or strictly prove the loss of earnings.

12. The learned magistrate erred in both law and fact by ignoring the fact that the Respondent had not neither pleaded nor proved any particulars that will justify an award for loss of earning including any employment and pre-accident his earnings prior to the accident.

13. The learned trial magistrate erred in both fact and law by ignoring the Appellant's written submissions and the annexed authorities."

4. The appeal was canvassed by way of written submissions. The Appellants' counsel placed reliance the decisions in Galaxy **Paints Company Limited v Falcon Guards Ltd [2000] eKLR, Gandy v Caspair [1956] EACA 139** and **Fernandes v People Newspapers Ltd [1972] EA 63** in submitting that in civil cases, parties are bound by their pleadings. On liability, he asserted that the Respondent's pleadings and oral accounts concerning the occurrence of the accident were inconsistent, with the former referring to an accident, and the latter to a calculated malicious assault upon the Respondent. He complained that the trial magistrate failed to appreciate these in determining liability between the parties. He pointed out that the Respondent was deemed to have admitted the defense averments as to contributory negligence as no reply to the amended defence was filed by him. For this proposition, counsel relied on **Unga Maize Millers Ltd v James Munene Kamau –ELD HCCA No. 16 of 2001.** Counsel therefore argued that the finding that the Appellants were wholly liable was against the weight of evidence and the parties' respective pleadings.

5. Concerning the award of general damages for pain and suffering counsel submitted that it was inordinately high and citing the case of **Kemfro Africa Ltd v Lubia & Anor [1985] eKLR** urged that it was erroneous estimate given the nature and extent of injuries sustained by the Respondent as reflected in medical reports and stated that the injuries in the authorities cited by the Respondent were more severe and therefore distinguishable from the instant case.. He urged the Court to review the award downwards to a sum of Kshs. 400,000/- and reiterated the decision cited by the Appellants at the trial, namely, **Isaac Mwenda Micheni v Mutegi Murango [2004] eKLR,** and other additional authorities including **Joseph Karisa Baya v Cefis Giorgio & Another [2020] eKLR**; and **Maselus Eric Atieno v Unitel Services Limited [2017].**

6. On future medical expenses counsel submitted the same was not specifically pleaded and proved by the Respondent and ought not to have been awarded by the trial court. Further, the trial court's award under the said head was unsupported and exceeded the medical evidence tendered by consent at the trial. Reliance was placed on the cases of **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** and **Mbaka Nguru & Anor v James George Akwara [1998] eKLR . Alternatively, counsel urged** that if the court were otherwise persuaded, it ought to reduce the award to **Kshs. 200,000/-**. Similar submissions were made concerning the award in respect of future earning capacity, counsel citing the cases of **Paul Otieno Obuya & Another v Joshua Atuti Ngoto & Another [2016] eKLR** and **Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR** to state that damages for loss of future earnings not having been specifically pleaded and proved could not be awarded. The Court was urged to allow the appeal.

7. The Respondent naturally defended the trial court's findings on liability and quantum. Reiterating the Respondent's evidence in the lower court and citing the principles espoused in **Butt v Khan** and **Mariga v Musila (1984) KLR** and **Mariga v Musila (1984) e KLR** counsel submitted that the Appellants have not shown cause for the appellate court ought to disturb the awards in the court below. He defended as reasonable the awards made in respect of general damages, future medical expenses and lost earnings, calling to his aid the decisions in

Kennedy Oscar v Musa Locho & 2 Others (2009) eKLR and **Cold Car Hire and Tours Ltd & 2 Others v Elizabeth Wambui Matheri**. He asserted that the appeal lacks merit and ought to fail.

8. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
>
> **An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**
>
> **In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

10. The court has considered the record of appeal, the pleadings and original record of the proceedings in the as well as the submissions by the respective parties. In the court's view, the Appellants' grounds of appeal can be condensed and considered under two key issues, namely, whether the finding of the trial court on liability was well founded, and secondly, whether the award of damages under various heads was justified in the circumstances of this case. Pertinent to the determination of these issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters.

11. In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

> **"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."** (Emphasis added).

12. The Respondent by the amended plaint had averred at paragraph 5 and 6 that:

> **" 5. At the time material to this case the 2nd defendant was the rider of the motor vehicle and an employee, servant and agent to the 1st defendant herein and in the actual control and use of motorcycle registration number KMCF 398E….**
>
> **6. On or about 19th day of July, 2011 at about 6 p.m. while the plaintiff was lawfully crossing Mombasa Road from Nakumatt towards M.P.P.S, the 2nd defendant drove, managed or controlled motor cycle registration KMCF 398E so negligently causing it to knock down the plaintiff"**

Particulars of negligence on the 2nd defendant's part;-

> **i) Driving at an excessive speed in the circumstances.**
>
> **ii) Driving without due care and attention.**
>
> **iii) Failing to brake, hoot, swerve, or act in any other manner to prevent the accident.**
>
> **iv) Causing motorcycle registration KMCF 389E to knock down the plaintiff.**
>
> **v) Failure to adhere to provisions of the Traffic Act – Cap 403 of the Laws of Kenya and the provisions of the Highway Code by overtaking other vehicles from the wrong side of the road affording the plaintiff no opportunity to notice its presence.**

Particulars of negligence on the 1st defendant's part;-

i) Employing and allowing a careless driver to take out their motorcycle and ride it on a busy highway where extreme care and attention was necessary."

13. The Appellants filed an amended statement of defence admitting the occurrence of the accident on the material date stating at paragraph 5A and 6A that:

> **"5A. Save that an accident occurred on or about the 19th day of July, 2011 at about 6:00 p.m. along Mombasa road involving a motor cycle registration number KMCF 398E and a pedestrian the 1st and 2nd defendant do not admit that the plaintiff herein was the said pedestrian and put the plaintiff to strict proof as to his involvement in the said accident. The 1st and 2nd defendants further deny that the accident was at all caused or in any way contributed to by the negligence and/or recklessness of the 2nd defendant in riding motorcycle registration number KMCF 398E and all singular the particulars of negligence alleged against the 2nd defendant in paragraph 6 of the amended plaint are denied and the plaintiff put to strict proof thereof...**
>
> **6A. The 1st and 2nd defendant contend that the said accident was wholly caused by the negligence of the pedestrian or in the alternative his negligence vey substantially contributed to the occurrence of the accident.**
>
> **Particulars of negligence of the pedestrian**
>
> **The pedestrian was negligent in that he;-**
>
> **a) Carelessly dashed onto the road before ascertaining that the road was free of vehicular traffic.**
>
> **b) Failed to look right then left then right again before attempting to cross the road as required by the Highway Code and Traffic Regulations.**
>
> **c) Failed to keep proper look-out for vehicular traffic on the said road and in particular motor cycle registration number KMCF 398E.**
>
> **d) Failed to heed the presence of motor cycle registration number KMCF 398E on the said road"**
>
> **e) Failed to have due regard to his own safety.**
>
> **f) Entered on the said road without due care and attention"**

14. The Appellants, relying on the decision in **Unga Maize Millers Ltd v James Munene Kamau** argued that in the absence of a reply to defence, the Respondent was deemed to have admitted the particulars of negligence attributed to him. Order Order 2 Rule 12(1) of the Civil Procedure Rules provides as follows:

> **"If there is no reply to a defence, there is a joinder of issue on that defence.**
>
> **2…**
>
> **3….**
>
> **4. A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue…."**

15. The Respondent's failure to file a reply to the amended statement of defence cannot therefore be construed as an admission of the negligence alleged therein. See the decisions of the Court of Appeal in **Denmus Oigoro Oonge v Njuca Consolidated Ltd [2012] eKLR** and **Ital Imports Limited v Mohamed Salim Karanja t/a Mosal Cleaning Enterprises & another [2014] eKLR.**

16. Now turning to the facts of the case, the occurrence of the accident involving the Respondent and the Appellants' motorcycle on the material date is not in dispute. When the hearing commenced on 4th May, 2016 the Respondent testified as **(PW1),** adopting his witness statement. In that statement, the Respondent stated inter alia that at about 6pm he "was ***crossing Mombasa Road from Nakumatt towards MPPS ...was about to complete crossing and join pedestrian walk (when) a motorcycle emerged from my left-hand side moving at a high speed in a bid to overtake a slow-moving lorry from the wrong side of the road."*** He continued to state that the motor cycle nearly hit him but braked sharply, stopping a few steps from where he was; that the Respondent scolded the rider for almost knocking him down and the latter thereafter *"reversed the motorcycle, powered its engine and drove off only for the motor cycle to strike my right leg and throw me on the road''* and crashing some metres away.

17. In his further oral evidence, he said he *wanted* to cross from **Nakumatt** to **Panari Hotel** on Mombasa Road and after the altercation with the rider the rider "turned the motorcycle and hit" him. Under cross examination, he stated that he was on the lane headed to Mombasa and wanted to cross to the lane headed for Nairobi, that vehicles were speeding and he was *"in the process of crossing the road…completing crossing the third lane"* when the speeding rider approached and initially passed by him apparently prior to the altercation and collision. He further stated that the rider did not reverse but turned towards Nairobi in order to hit him, admitting that motorcycles have no reverse gear.

18. First, taking judicial notice of the locations of the accident, Mombasa Road is a dual carriage way with two sets of lanes, one set headed towards Nairobi and the other set towards Mombasa. The court notes that **M.P.P.S**, the initial alleged destination/direction asserted in the Respondent's witness statement is on the Mombasa/ Nairobi carriage way while the other alleged destination/direction **Panari Hotel** is on

the Nairobi/Mombasa carriage way. If, as stated by the Respondent in his written statement, he had almost completed crossing towards **M.P.S.S** when the motorcycle approached from his left-hand side, the said motorcycle could only have been coming from Mombasa direction heading towards Nairobi. Equally, if he was in the process of crossing the Nairobi/Mombasa carriage way towards **Panari Hotel**, the motorcycle could only have emerged from his left-hand side if it was headed towards Mombasa direction. However, it is inconceivable that the Respondent was simultaneously headed towards the Panari Hotel and headed towards the Mombasa/Nairobi carriageway in the **M.P.S.S** direction as his various statements above suggest. It is difficult to reconcile the assertions of the Respondent in this regard. Be that as it may, **DW1** stated that the collision occurred on the Nairobi/Mombasa carriage way heading to Mombasa.

19. The most remarkable part of the Respondent's evidence however relates to his narration as to the manner of the occurrence of the accident. He asserted that the motorcyclist having narrowly missed knocking him down had stopped a few metres ahead of him, that the Respondent scolded the rider , and then the rider *turned* his motorcycle towards Nairobi direction (which would suggest that he was on the Nairobi/Mombasa carriage way at the time) or *reversed* it in the said direction before charging towards and knocking down the Respondent and crashing. The claim that the rider *reversed* the motorcycle is contained in the Respondent's statement, while the claim that the rider *turned* his motorcycle was first made in his oral evidence and cross-examination when he also admitted that motorcycles do not have a reverse gear.

20. Whether the rider reversed or turned in the opposite direction so as to charge at the Respondent behind him, such action would have been intentional, deliberate and/or willful and malicious on his part. Indeed, that is what the Respondent communicates by his narrative. Several questions arise from these claims. First, whether the scenario painted by the Respondent is possible during peak time on a busy highway carrying speeding vehicles (at 6pm per the Respondent) without involving other traffic. Secondly, is it believable that the Respondent remained rooted on the road as the rider made his alleged maneuvers in readiness to knock him down? Despite the Respondent's own evidence, the trial court stated in its judgment that:

> **"The plaintiff has clearly stated how the 2nd defendant hit him and the 2nd defendant admits having hit the plaintiff. From the evidence of the plaintiff he was hit by the 2nd defendant on the walk way and it is not true that the plaintiff was carelessly crossing the road hence I find the 2nd defendant 100% liable for the injuries the plaintiff sustained."**

21. There is no evidence that the Respondent was on the pedestrian walk at the time of being knocked down and the evidence on the occurrence of the accident was far from clear, raising more questions than answers. More importantly, as correctly pointed out by the Appellants, the Respondent's asserted malicious and intentional acts on the part of the rider are not pleaded in the amended plaint, and *ex facie* tend to negate the negligence pleaded therein. **Black's Law Dictionary, Tenth Edition** defines negligence in part as:

> **"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights…."**

22. While there was no requirement for the Respondent to plead his evidence, he was duty bound to precisely plead albeit in summary form, the material facts forming the basis of his claim against the Appellants. In **Gandy Vs. Caspair [1956] EACA 139.** In **Associated Electrical Industries Ltd v William Okoth (2004) eKLR, Visram J**. (as he was) stated:

> **"I entirely agree with the Appellant's submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved".**

23. No doubt the learned Judge was echoing the words of the Court of Appeal in **Galaxy Paints Company Ltd V. Falcon Guards Ltd (2000) eKLR**; where the court stated:

> **"It is trite law, and the provisions of OXIV of the CPR, are clear that issues for determination in a suit generally flow from the pleadings, and unless the pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of OXXr4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination".**

24. Finally, is it conceivable that the rider *reversed* or *turned* his motorcycle towards Nairobi direction and to oncoming traffic and in a few metres picked up such speed as to knock the Respondent flat down on the road? This account sounds contrived and implausible, and the trial court ought to have examined the evidence in greater depth.

25. On his part, the 2nd Appellant who testified as **DW1** stated he was riding the suit motorcycle in the middle lane of the three-lane carriage way towards Mombasa direction; that while he was overtaking a lorry to his left (that would be from Panari Hotel side), a pedestrian dashed in from the left while crossing the road; and unable to avoid him a collision ensued. He denied that the pedestrian was walking on the pedestrian walk at the time. He blamed the pedestrian for the accident. He reiterated this evidence under cross-examination. Notably, the Respondent's counsel did not suggest to **DW1** the narrative of the accident adopted by the Respondent at the trial, to confirm or deny.

26. This court upon its own review of the evidence is doubtful about the veracity of the Respondent's version on the occurrence of the accident. It seems, on the contrary that the accident may well have happened in the manner described by **DW1**. The credibility of the Respondent appears doubtful. From his testimony, it is not possible to ascertain the most basic fact concerning the precise direction in which he was headed at the time of the accident, and his narration concerning the accident itself appears incredulous. It is true for civil cases as it is in other cases that a witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that that he is an unreliable witness. The trial court erred by its failure to properly assess the Respondent's evidence and by accepting it without a proper analysis and reasoning and finally, by ignoring the rival testimony put up by the Appellants. The Appellants complaints in this regard have

merit.

27. Pursuant to the provisions of sections 107 and 108 of the Evidence Act, the duty to prove the allegations of negligence contained in the amended plaint lay upon the Respondent. As the Court of Appeal stated in **Kiema Mutuku -Vs- Kenya Cargo Handling Services Limited [1991] 2 KAR 258**:

> **"There is, as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

28. In this instance, the Respondent failed to prove negligence on the part of the rider and the finding by the trial court to the contrary was against the weight of evidence. Liability was not established against the Appellants.

29. Regarding quantum, the court stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** that:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low".**

See also **Kemfro Africa t/a Meru Express Service** and **Another [1982 – 1988] I KLR 727.**

30. Having considered the submissions on quantum and the evidence, and applying the principles enunciated in **Kemfro Africa Limited t/a Meru Express Service and Gathogo Kanini v A. M. Lubia and Another [1982-88] IKAR 727** this court agrees with the Appellants' submissions that the awards by the trial court appear excessive and or unjustified. The Respondent suffered a compound fracture of the right tibia fibula and suffered extended morbidity. He endured much pain and had to undergo a surgical procedure per the medical report by **Dr. Moses Kinuthia** (P. Exh.1) as confirmed by the medical report by the Appellants' **Dr. Ashwin Madhiwala** (DExh. 1). Due to mal-union of the fracture, the affected leg was shortened, and corrective surgery was necessary at a cost of Sh. 250,000/- per Dr. Kinuthia or Sh.150,000/- per Dr. Madhiwala.

31. The trial court awarded general damages in the sum of at Shs. 1,000,000/-. There is no reference in the judgment to any of the decided authorities cited by the parties in submissions. Before this court, counsel for the Appellants assailed the award as excessive and sought it be reviewed downwards to Sh.450,000/- while the Respondent's counsel submitted that the award was not inordinately high and ought not to be disturbed. I have looked at the authorities cited by the parties before the trial court and noted that in comparison to the Respondent's injuries, the authorities relied on by the Respondent reflect more severe injuries and sequela, whereas the one case cited by the Appellants may reflect less severe injuries and sequela. In addition, the Respondent's sole authority **Isaac Mwenda Micheni v Mutegi Murango (2004) eKLR** was rather dated. It is unacceptable for the Appellants to introduce new authorities on appeal as they have done.

32. This court agrees with **Ochieng J** in his judgment in **Silas Tiren & Another V. Simon Ombati Omiambo [2014] eKLR** wherein the learned Judge took exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> **"None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court … it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court… The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."**

33. On the part of the Respondent, of the two authorities cited, **Kennedy Oseur** though representing very severe injuries due to massive loss of muscle accompanying the compound fractures, was the more relevant one. In that case general damages awarded for pain and suffering amounted to Sh.2,089,479/- while in **Mwenda's** case the court awarded Sh. 100,000/- for pain and suffering. An award of sh.450, 000/- in this case as proposed by the Appellants would be too low, while the trial court's award which was not justified in any detail appears a tad too high given that the most significant injury suffered by the Respondent was the leg fracture. In my considered view, an award of Sh.750,000/- (Seven Hundred and Fifty Thousand) in general damages would have sufficed had liability been established.

34. Regarding future medical expenses, these were pleaded in the amended plaint but without figures. As stated in the case of **Simon Taveta** both claims for loss of earnings and future medical expenses ought to be pleaded as special damages, although the latter fall under the rubric of general damages. In my reading, **Simon Taveta** does not state that the specific sums sought thereunder must be pleaded although it would be more prudent to include an estimate, if known, of the expected costs which naturally lie in a future realm. Nevertheless, there was no evidential basis for the trial court's award of Sh.500,000/- under this head. The Respondent herein could only have been entitled to a maximum sum of Sh.250,000/- under this head had he succeeded in proving liability. The award in respect of loss of earnings was neither pleaded nor proved and had no basis. The said award was erroneous.

35. In the result, the appeal has succeeded. The judgment of the lower court is hereby set aside and this Court substitutes therefor an order dismissing the Respondent's suit in the lower court. However, the parties will bear their respective costs in the said court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28Th OCTOBER 2021

C.MEOLI

JUDGE

In the presence of:

Mr Upendo h/b for Mr.Namada for Respondent

Ms. Wahome h/b for Mr. Mege for the Appellants

C/A: Sarah