REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 156 OF 2017

BETWEEN

SAMUEL NJOROGE KAMAU.....1ST APPELLANT

CITY HOPPER LIMITED.....2ND APPELLANT

VS

ROSEMARY WANJIRU NDUNGU.....RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court at Kikuyu

G. Onsarigo, RM in the CMCC No. 170 of 2010 delivered on the 21/09/2017)

JUDGMENT

1. ***ROSEMARY WANJIRU NDUNGU,*** hereinafter the respondent sued before the Kikuyu Principal Magistrate's Court, ***SAMUEL NJOROGE KAMAU*** and ***CITY HOPPA LIMITED***, collectively hereinafter referred to as the appellants. She sought damages for the injuries she suffered which she alleged were as a result of the negligence of the appellants. The trial court by its judgment of 21st September, 2017 awarded the respondent Kshs.419,356 plus costs and interests. The appellants have filed this appeal against that award.

2. The principle that guides the first appellate court is that an appeal is a retrial. The appellants are therefore entitled to an exhaustive re-evaluation of the evidence on record and this Court can draw its own conclusion always bearing in mind that it neither saw nor heard the witnesses: See the case ***SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LIMITED (1968) EA 123.***

3. The respondent pleaded through her plaint that she sustained injuries while travelling in motor vehicle registration No. KAU 206J. That accident, as pleaded by the respondent, occurred as she alighted the said vehicle. The respondent pleaded that she suffered the following injuries:-

(a) Blunt trauma to the head.

(b) Chipped one left upper medial incisor tooth.

(c) Bund trauma to the chest.

(d) Blunt trauma to the abdomen.

(e) Physical and psychological pain.

4. The appellants' appeal is in regard to the quantum of damages awarded by the trial court. The appellants faulted the trial court for awarding the respondent Kshs.400,000 in general damages and Kshs.9,356 in special damages and Kshs.10,000/= for future medical expenses. It is the appellants' contention that those awards were inordinately high and that the trial court erred in failing to consider conventional awards of similar cases.

5. Before considering those grounds of appeal presented by the appellants, I shall begin by considering the respondent's submission that this appeal is incompetent for the record of appeal lacks a decree of the trial court, the subject of this appeal. The respondent cited ***Order 42 Rule 13(4),*** in support of its opposition to this appeal, which provides:-

> "***4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:-***
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> ***a) the memorandum of appeal;***
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> ***b) the pleadings;***
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> ***c) the notes of the trial magistrate made at the hearing;***
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> ***d) the transcript of any official shorthand typist notes, electronic recording or palantypist notes made at the hearing;***
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> ***e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
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> ***f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

6. The respondent relied on the case ***NDEGWA KAMAU T/A SIDEVIEW GARAGE VS. FREDRICK ISIKA KAUMBO (2016) eKLR*** where the court proceeded to strike out the appeal on the ground that the appellant had failed to extract and present to the High Court the decree appealed against. The court in striking that appeal stated:-

> ***"It is clear from this provision of the law that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. It is clearly for this reason that section 79G provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in section 79G of the Act is not a pastime which one may choose to overlook but rather it is a mandatory ritual without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court."***

7. **Order 42 Rule 13(4)** of the Civil Procedure Act as correctly stated by the respondent requires, before an appeal is considered by the High Court, a decree to be provided and be part of the record of appeal amongst other documents. But a careful reading of that Rule will reveal that the requirement is that "the judgment, order or decree" (underlining mine) be filed. That the provisions in that Rule is in tandem with what is stated in **Section 2** of the Civil Procedure Act, the definition Section. In defining what **decree means**, that section states:-

> ***"Provided that, for the purpose of appeal, "decree" includes judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn."*** (underlining mine)

8. In this case, the appellants provided the trial court's judgment and it is part of the record of appeal. Considering **Order 42 Rule 13(4**) and **Section 2 of the Act,** I make a finding that this appeal is competent because the judgment of the trial court was availed. The objection in that regard raised by the respondent is overruled.

9. I shall now delve into the substantive appeal.

10. The respondent's pleadings on the injuries she suffered were reproduced above. There is a long and established legal principal that parties are bound by their pleadings. This principle was re-stated in the case ***ELIZABETH O. ODHIAMBO VS. SOUTH NYANZA SUGAR CO. LTD (2019) eKLR*** thus:-

> ***"15. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of*** *DAVID SIRONGA OLE TUKAI V FRANCIS ARAP MUGE & 2 OTHERS eKLR* ***Civil Appeal No. 76 of 2014 [2014] thus;***
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> ***"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."***

11. The appellant submitted correctly in my view that, the respondent did not plead that she suffered a miscarriage following the accident. That notwithstanding the trial court, referring to a medical report of *Dr. Mwaura* granted damages for that miscarriage.

12. The respondent was admitted into the PCEA Kikuyu hospital for one day following her accident. The discharge summary of that hospital noted the respondent was two months pregnant. It also noted on admission she was bleeding from the mount, nostrils and ear. The hospital did not note visible injures externally but detected soft, tender in the abdomen. The report further stated:-

> "***On discharge pt*** (patient) ***stable no abdomen pain."***

13. The P3 Form dated 11th December, 2009 only noted that the respondent suffered soft injuries to the head and neck.

14. The respondent relied on a medical report by *Dr. G.K. Mwaura* dated 20th October, 2010 where the doctor stated in reference to the respondent:-

(i) She suffered multiple soft tissue injuries and subsequent miscarriage on 24/02/2010.

(ii) One upper left incisor tooth broken.

(iii) She complains of bouts of headaches.

(iv) She experiences chest pains on exertion.

(v) She requires dental treatment (broken tooth) at cost of Kshs.10,000.00

15. The appellant correctly submitted that the respondent did not plead injuries to her foetus leading to her miscarriage. It was mandatory for that to be pleaded. This was clearly stated in the case ***TREADSETTERS TYRES LTD VS. JOHN WEKESA WEPUKHULU (2010) eKLR*** thus:-

> ***"I have carefully considered the above. First however much, the courts are Courts of Equity, there are certain procedural law that cannot be overridden by principles of equity. Each party is bound by his pleadings. In cases of tortuous claims based on negligence, injuries and special damages must be pleaded. They cannot be imagined or inferred. The court's road-map are the pleadings on record. If a party alleges he suffered an injury, he must particularize the same so that the Defendant can specifically respond to the claim. One must plead the nature and extent of injuries suffers. This is a mandatory requirement of the law. His omission cannot be cured by principle of equity or the principles envisaged in Section 1A, 1B and 3A of the Civil Procedure Rules."***

16. The trial court in my view erred to have considered the miscarriage of the respondent when the same was not pleaded.

17. In considering the appeal on quantum I am guided by the case ***KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES (1976) & ANOTHER VS. LUBIA & ANOTHER (NO.2) (1985) eKLR.***

18. The medical reports made on behalf of the appellants and respondents reveal the respondent suffered soft tissue injuries. I have considered the cases ***DAVID ABDALLA TIEGO & OTHERS VS. IRENE TAGO MARANDA (2018) EKLR and JAMES NGNAGA KIMANI VS. GIACHANGI NJOROGE & OTHERS (2019) eKLR*** where the injuries suffered were comparable to the injuries the respondent suffered. Having considered these cases, I find the award on general damages of the trial court was excessive. I find the trial court erred to award the respondent Kshs.400,000/= general damages. Bearing in mind the decided cases with comparable injuries, I find and hold that the trial court's award of general damages was inordinately high. I do substitute that award with an award of Kshs.200,000/=.

CONCLUSION

19. Bearing the above in mind this appeal is allowed in the following terms:-

(a) The award of the trial court of Kshs.400,000 in general damages is hereby set aside. The respondent is hereby awarded Kshs.200,000/- in general damages.

(b) The trial court's award on costs and in special damages of Kshs.19,356 is upheld.

(c) The appellant is awarded half the costs of this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For the Appellants: Ms. Chairchir Holding brief for Thairu

For the Respondent: Mr. Mwaniki

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE