REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 6 OF 2019

(CORAM: R. E. ABURILI - J.)

NOEL ISRAEL OWITI.....APPELLANT

VERSUS

JOSEPH MAGERO.....1ST RESPONDENT

CHAIRMAN, B.O.G. SAWAGONGO HIGH SCHOOL.....2ND RESPONDENT

(Appeal from the judgment and decree of Hon T. M. Olando, Senior Resident Magistrate,

delivered on 7th December, 2018 in Siaya Principal Magistrate Civil Suit No. 16 of 2017)

JUDGMENT

1. Before the Magistrate's Court, the appellant herein **Noel Israel Owiti** sued the Respondents who are **Teacher** and **Board of Management of the Sawagongo High School** claiming for damages arising from alleged assault by the 1st defendant/Respondent teacher occasioned to the appellant/plaintiff student who was then in form for in the second defendant/Respondent school.

2. After a full trial in a contested suit, the trial Court found the defendants jointly and severally liable for assault and for occasioning injuries to the appellant/plaintiff and awarded him Kshs 100,000 general damages for pain, suffering and loss of amenities. The appellant who had also pleaded damages for future medical expenses was denied the same.

3. Aggrieved by the judgment and decree of the lower court on quantum of damages awarded, the appellant filed this appeal vide memorandum of appeal dated contending that:

> *1. The learned trial Magistrate erred in law and in fact in that he misconstrued and misunderstood the medical report which were uncontroverted and as a result came to a wrong conclusion on the nature of the injuries sustained by the appellant and their effect on the appellant's future health and social life;*
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> *2. The learned trial Magistrate erred in law and in fact when after making a finding that the claim for special damages relating to future medical expenses had been pleaded and evidence in support thereof adduced, contradicted himself in the same judgment by making a further finding that the amount was neither pleaded nor proved;*
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> *3. The learned trial Magistrate erred in law and in fact when he held that the claim for future medical expenses was not justified based on the injuries sustained by the plaintiff being soft tissue injuries despite the overwhelming and uncontroverted evidence on record;*
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> *4. The learned trial Magistrate erred in law and in fact in that he misunderstood the prayers by the appellant in the plaint and applied wrong principles of law and as a result prejudicing the appellant';*
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> *5. The learned trial Magistrate erred in law and in fact when he erroneously and thereby used his discretion wrongly in awarding minimal damages in the circumstances and failing to consider the pleadings and submissions urged on behalf of the appellant before him and to take into account the fact that comparable injuries should always attract comparable awards bearing in mind the value of the shilling today and the general trend of inflation;*

6. The learned trial Magistrate totally erred in law and in fact in that he failed to consider or sufficiently consider the material placed before him and as a result came to wrong conclusions and prejudiced the appellant.

4. The appellant urged this court to allow this appeal and to set aside part of the judgment and decree relating to the award of general damages and future medical expenses, together with costs of this appeal.

5. This being a first appeal, this court is obliged, under Section 78 of the Civil Procedure Act to examine and evaluate the evidence of the trial court and come to its own findings and conclusions, but in doing so, give an allowance to the fact that it neither heard nor saw the witnesses testify. This principle was espoused in the case of **Sielle – vs – Associated Motor Boat Co. (1965) EA 123.**

6. Revisiting the trial court record and evidence adduced on quantum of damages both special and general damages, the plaintiff/ appellant pleaded in his plaint dated 27th January 2017 that following the assault by the 1st defendant/Respondent, he sustained severe injuries and continues to suffer loss and damage for which he holds the defendants liable. The injuries pleaded were:

a. Injury on the back with cut wounds

b. Injury to the left hand.

7. The appellant also pleaded special damages as follows:

a. Medical Report receipt Kshs 2500/-

b. Receipt dated 22.04.2015 Kshs 1000/-

c. Total: Kshs 3500/-

8. In the final prayers of the said plaint, the appellant prayed for:

a. General damages

b. Special damages set out in Paragraph 8B foregoing

c. Cost of future medical treatment

d. Costs of this suit

e. Interest on (a) from the date of judgment until payment in full

f. Interest on (b) and (c) from the date of filing suit until payment in full.

9. This court observes that the plaintiff did not plead the claim for future medical expenses in the final prayers of his plaint. However, a perusal of the plaint shows that paragraph 10 of the said plaint, the plaintiff/appellant herein pleaded as follows:

"10. The plaintiff avers that due to the ugly scars in his body, he's in need of cosmetic/ reconstructive surgery that will cost him a tune of Kshs 450,000 and the plaintiff now claims these amount as future medical expenses as against the defendants."

10. In his witness statement which was adopted as his evidence in chief, the appellant testified as follows concerning his injuries:

"Due to the assault occasioned to me by the 1st Defendant, I injured my lower back region, upper back region and had inflammation on my hands and the said injuries have not healed well as they have left very ugly scars on my body which in turn has led to me having low self-esteem issues as I find it difficult to engage in activities like swimming like I did before due to the questions that other people ask me on how I got the scars."

11. In his oral testimony, the appellant produced photographs taken by his father, of the injuries he sustained following the undisputed assault as he also produced as exhibit a letter written by the first Respondent to his father, apologizing for assaulting the appellant/plaintiff. and certificates of electronic evidence. The appellant/ plaintiff added that he also went to Dr. Okombo on 14/1/2028 and that he had not healed by that time. That he had pain on his back and arms. He stated***: "the doctor advised that I would need corrective surgery of Kshs 450,000."*** He produced the medical report of Dr. Okombo as Pex 10(a). He stated that he still had constant pain. He prayed for general damages and special damages and costs of plastic surgery of Kshs 450,000 and costs of the suit.

12. In cross examination, the appellant claimed that the doctor told him that his nerves were ruptured. He reiterated this in his re-examination.

13. In the medical Report dated 14/1/2017 by Dr. Okombo and produced as exhibit 10(a) by consent of both parties to the suit and this appeal, the injuries listed were as pleaded. The Report goes further to state that on examination, the appellant's general condition was good, locally, he had:

- Scar 0.5cm x28cm located on the back 12 in number
- Scar 0.5 x26cm 8 in number on the left hand
- Tenderness on the back
- Tenderness on the left hand

14. In his conclusion, Dr. Okombo stated:

> ***"The injuries the victim sustained following the accident negatively impacted on his health and productivity.***
>
> ***?At the time of his visit to the clinic for medical examination, he had not fully recovered and was still complaining of pains on the back and left hand which were as a result of the soft tissue injuries.***
>
> ***?He therefore needs further treatment (physiotherapy/analgesics)***
>
> ***?The scar will need reconstructive surgery***
>
> ***?The Treatment cost is estimated to cost a minimum of Kshs 450,000/=***
>
> ***?The injuries are Harm."***

15. In his judgment which is impugned, the trial magistrate found the defendants jointly and severally liable for the assault and injuries sustained by the appellant/plaintiff. On damages claimed, the trial court awarded the plaintiff Kshs 100,000 general damages (against Kshs 2,000,000 claimed by the appellant's counsel) and on further medical expenses, he stated:

> ***"on the issue of further medical expenses, I find that these are special damages which must be specifically pleaded and proved. Though the plaintiff pleaded for future medical expenses the amount was not pleaded and considering the fact that the plaintiff sustained minor soft tissue injuries, I find that the claim was not justified…."***

16. In the written submissions filed on 22nd November 2019 to canvass this appeal, the appellant's counsel framed two issues for determination namely:

> ***a. Whether the trial court erred in declining to award the appellant the costs of future medical expenses***
>
> ***b. Whether the trial court properly exercised its discretion in awarding the appellant Kshs 100,000 as general damages.***

16. On the first issue touching on future medical expenses, counsel for the appellant submitted that the appellant had pleaded for the cost of future medical expenses which the trial magistrate acknowledged in his judgment but nonetheless stated that the appellant had not pleaded the amount and that he declined to grant it claiming that the injuries were minor soft tissue injuries.

17. He submitted that the claim was specifically pleaded and proved by evidence of the appellant and the medical report of Dr. Okombo produced as exhibit by consent hence the trial magistrate misapprehended the evidence before him as the doctor's medical report outlined the injuries suffered by the appellant and what it would take to get rid of the scars inflicted by the 1st defendant. Reliance was placed on section 12 of the Evidence Act which stipulates that ***"any fact which will enable the court to determine the amount of damages to be awarded is relevant"*** and section 48 of the Evidence Act on the admissibility of the medical report by Dr. Okombo which provided for the cost of future medical expenses of Kshs 450,000, which were pleaded and proved.

18. On the second issue of whether the trial court properly exercised its discretion in awarding the appellant Kshs 100,000 as general damages, counsel submitted that the trial court erroneously referred to the injuries sustained by the appellant as ***minor*** soft injuries yet the P3 form and the Medical Reports never stated that the injuries were minor soft tissue injuries. He relied on **Caroline Wanjiku Karimi v Simon K.Tum & Another [2012] e KLR** where Mwongo J awarded Kshs 1,800,000 to the plaintiff who allegedly sustained similar injuries. The appellant's counsel urged this court to award his client Kshs 2 million general damages and Kshs 450,000 for cost of future medical expenses.

19. Opposing the appeal, the Respondents' counsel file written submissions dated 25th November 2019. On whether the trial magistrate erred in its decision on quantum of damages and future medical expenses, counsel for the Respondents submitted that the treatment notes, P3 form and medical reports produced as exhibits all showed the appellant to have sustained soft tissue injuries hence the general damages awarded is reasonable and commensurate with the injuries suffered . further, that Kshs 2m asked for is unreasonably high in the circumstances. He urged this court not to interfere with the award made by the trial court, relying on **Ahmed Butt v Ahmed Khan [1982-88] KAR.** He also relied on **Boniface Waiti &another v Michael Kariuki Kamau [2007]e KLR** and submitted that from appellant's submissions, he is interested in enriching himself and not in compensation. It was submitted that although the medical report by Dr. Okombo claims that the appellant sustained injuries including deep cut wounds, the P3 form and treatment notes state that the injuries were inflammation and soft tissue injuries. Further, that the injuries pleaded were sustained on 28/1/2015 and not those of 28/1/2016 as stated by Dr. Okombo in his medical report. Reliance was placed on **Galaxy Paints Company Ltd v Falcon Guards Ltd CA 219 of 1998** where it was held that the issue to be determined flow from pleadings and as framed by parties to a suit. The Respondent's counsel urged this court to disregard the injuries stated in the medical Report by Dr. Okombo. He submitted that there was no proof that the injuries sustained warranted future medical expenses claimed as they were inflammation which were soft tissue injuries and not cut wounds. It was further stated that the appellant claimed that he saw Dr. Okombo on 14.1.2018 yet the medical report claims examination took place in 2017. He relied on **Joseph**

Mbuta Nzii v Kenya Orient Insurance Co Lt [2015] e KLR; IEBC and another v Stephen Mutinda Mule and 3 others [2014] e KLR where the Court of Appeal stated that parties are bound by their pleadings. It was submitted that if the court relies on any document that is irrelevant to the facts as pleaded then, it would be entering on speculations of a decision given on a defence and not made or raised by or against a party, which would be equivalent to not hearing a party at all hence denial of justice. Counsel maintained that the trial court applied his discretion justly and arrived at the right decision having regard to the circumstances of the case, facts and evidence adduced by the appellant. That there was no evidence of scars or its effects on the appellant's self-esteem. He urged this court to dismiss the appeal with costs to the Respondent.

DETERMINATION

21. I have carefully considered the appeal herein, the evidence before the trial court, the submission for and against the appeal and the authorities cited by both counsel for the respective parties.

22. The only issue for determination in this appeal is whether the trial magistrate erred in law and fact in awarding Kshs. 100,000/= as general damages for pain, suffering and in failing to make an order granting relief on the claim for future medical expenses in the sum of Kshs 450,000/- in favour of the plaintiff/appellant herein.

23. As correctly submitted by both counsel on record, it is now trite law that an Appellate court cannot interfere with an award of general damages which is within the discretion of the trial court, unless it is shown that the award or denial thereof violates the grounds as enumerated in the case of ***Charles Owino Odoyo Vs Appollo Justus Andabwa and another [2017] eKLR***.

24. It is not in dispute that the appellant student sustained injuries classified in the P3 form produced in evidence as harm. It is also not in dispute that the appellant pleaded for the cost of future medical expenses in the sum of Kshs. 450,000/= which he claimed would be the cost of cosmetic /reconstructive surgery due to alleged ugly scars in his body. This cost was arrived at by the Doctor who examined him and indicated that the appellant would require reconstructive surgery at the estimated cost of Kshs. 450,000/= due to scars inflicted by the Respondents.

25. The trial magistrate in addressing this claim observed that albeit the claim was pleaded, **the amount was not pleaded** and that considering the fact that the plaintiff sustained minor soft tissue injuries, the claim was not justified.

26. To the extent that the trial magistrate found that the appellant did not plead the amount of the cost of future expenses, it is my finding and holding that the learned trial magistrate fell into error as the plaintiff clearly pleaded the claim at para 10 of the Plaint and even quantified the amount based on the Medical Report by Dr. Okombo dated 14.1.2017.

27. The Plaintiff pleaded and testified that on 28/1/2015 while he was in F.4 at the Respondent school, the 1st Respondent Deputy Head teacher called him to the office and hit the appellant with an electrical cable wire on the head and back and left hand. He bled. He went to class while in pain. The school never treated him and neither did they allow him out of the school for medical attention. He however, managed to contact his parents who went to school on 29/1/2015 and took him to hospital for treatment.

28. Thereafter they reported the matter to the police, recorded a statement and he was issued with a P3 form which he produced as an exhibit 4. He also produced photographs showing the injuries as PEx 3a-g which were taken by his father and a certificate of authentication as PEx 6 and certificate of print as PEx 7. He also produced a letter PEx 8 being a letter of apology written by the 1st Defendant to tis parent regretting the incident and injury caused to the plaintiff.

29. The Appellant testified that he still had pain in his back and arms and that the doctor advised that he would need corrective surgery at Kshs. 450,000/= and that he continued with treatment the last being 23.1.17 as per PEx 12 receipt from the doctor for payment made for medical attention.

30. In cross examination, the appellant stated that he was refused to go home and that the doctor told him that the assault affected his nerves.

31. The Respondents despite being granted leave to file a witness statement late and adjournments granted to call their witness, they failed to do so and closed their case without calling any evidence to challenge the appellant's case and evidence.

32. From the Medical Report by Dr. Okombo, the Appellant sustained injuries on the back with cut wound and injury to the left hand.

33. In the apology letter dated 5/2/2015, the 1st Respondent acknowledged caning the appellant student and causing him injuries. He also acknowledged the fact that he only realized later that the appellant had injuries and that no amount of explanation can justify his actions. He acknowledged that he knew the appellant had gone through pain and psychological disturbance and regretted the incident which he called unfortunate.

34. I have seen the photograph produced as exhibit 5(a-g) showing the injuries (lashes) on the left upper arm and on the back side body of the appellant. The P3 dated 29/1/2015 classifies injuries as ***harm.***

35. The appellant was treated as an outpatient. As at 14/1/2017 when he was examined by Dr. Okombo, he claimed that he had pain on the injured areas - back and left hand. He also had healed scars in the injured areas measuring 0.5 x 28 cm on the back - 12 in number and 8 on the left hand measuring 0.5 x 26 cm as well as tenderness on the left hand.

36. The doctor stated that the appellant needed further treatment (physiotherapy / analgesics, reconstructive surgery whose treatment will cost approximately Kshs. 450,000/= minimum and he also confirmed that the injuries were ***harm***.

37. According to the P3 form, 'harm' means:

> ***"any bodily hurt, disease or disorder whether permanent or temporary."***

38. In the said P3 form filled on 29/1/2015, the appellant is said to have been injured on 28/1/2018 at 7.30hours. the injury noted was inflammation on the back. There was no tear but there was dry blood noted. The degree of injury was assessed as **harm**. Similarly, the treatment notes from Yala Level Four Hospital PEX 3 shows that the plaintiff was attended to on 29/1/2015 as an outpatient and he sustained injury on the back.

39. As earlier stated, the pleaded injuries were injury on the back with cut wounds and injury to the left hand.

40. The report by Dr. Okombo is clearly dated 14/1/2017 and albeit the appellant stated that he saw Dr. Okombo on 14/1/2018, I find no evidence to that effect. In my view, the appellant could have given the latter date inadvertently as the hearing was taking place three years after the incident of assault.

41. The question that I must pose is whether the trial court was bound to accept the Medical Report by Dr. Okombo with regard to the type of injuries allegedly sustained by the appellant and as pleaded and secondly whether the cost of reconstructive surgery as pleaded was justified or proved.

42. The Appellant produced the Medical Report by Dr. Okombo without any objection from the Respondents.

43. However, the burden of proof lies on he who alleges. In this case, the burden of proof lay on the appellant to prove on a balance of probabilities that the pleaded injuries are the ones he suffered and that the said injuries warranted future reconstructive surgery.

44. A party is bound by their pleadings as this gives the adverse party ample time to defend the suit based on the pleadings and not to be surprised by evidence that does not support the pleadings. See **Charles C. Sande Vs. Kenya Co-operative Creameries Limited Civil Appeal No. 152/1992** where it was aptly put:

> ***"All the rules of pleading and procedure are designed to crystallize the issues a Judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are"***

45. From my analysis of the evidence adduced by the appellant, the claim as pleaded in the plaint that the appellant sustained back injuries with cut wounds, regrettably, was not supported by any treatment notes to the effect that the injuries were cut wounds, the P3 form which was filled only a day after the assault, and the treatment notes from Yala Level Four Hospital dated a day after the assault do not show any cut wound. The Photographs produced by the plaintiff of the injuries show lashes –whips marks on the back and left hand. This is what the P3 form reveals to be inflammation. The question is, how could Dr. Okombo get the Cut wounds on the appellant's back on 14.1.2017 nearly two years after the assault on the appellant, which cut wounds were never seen a day after the assault? The other question that follows is therefore whether the medical report by Dr. Okombo is credible and or believable? Further, does the fact that the evidence by the appellant was not controverted in itself guarantee the appellant judgment in his favour?

46. Section 107 of the Evidence Act (Cap 80) Laws of Kenya provides:

> ***"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."***

47. It is settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

48. In the cases of **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997**, it was held that ***where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.*** In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998** appreciated that:

> ***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."***

49. In the case of **Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988,** Makhandia, J held that:

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

50. However, more recently, Eboso J in **Lucy Njeri v Isaac Wangoya Mwangi & another [2018] e KLR** observed quite correctly:

> ***"The appellant submitted at length that since the 1st defendant did not call any evidence, her evidence remained unchallenged and that the trial court ought therefore to have allowed her claim as sought in the plaint. This proposition is incorrect because it is trite law that even where no evidence is called in rebuttal, the plaintiff's burden to prove her case on a balance of probabilities by adducing credible evidence remains. This was the finding of the Court of Appeal in Charterhouse Bank Limited (Under Statutory Management) vs. Frank N. Kamau, Nairobi CA No. 87 of 2014 (2016) eKLR where the court stated as follows:-***
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> > ***"In Karugi & Another v. Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."***
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> > > ***Consequently, failure by the 1st respondent to lead evidence did not in itself automatically constitute proof on a balance of probabilities as a matter of course. It was incumbent upon the appellant to present credible evidence in support of her claim.[emphasis added].***

51. Gacheru J added her voice to this discussion in **Godfrey Ngatia Njoroge v James Ndungu Mungai [2019] e KLR [ELC] and** observed that:

> ***"The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case.*** *The Plaintiff has to discharge the burden of proof. See the case of* ***Kenya Power & Lighting Company Limited…Vs…Nathan Karanja Gachoka & Another [2016] eKLR, where the Court*** *stated:-*
>
> ***"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.''[emphasis added].***

52. Further in the case of ***Gichinga Kibutha…Vs…Carooline Nduku (2018) eKLR,*** the Court held:

> ***"It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.''[emphasis added]***

53. Dr. Okombo is described in the letter head on the Medical Report as physician. There is no evidence to suggest that the appellant ever saw a physiotherapist or a plastic surgeon with a view to assessing the injuries that he sustained for purposes of determining the need for future reconstructive surgery.

54. Therefore, whereas the respondent did not call any evidence to controvert the medical report by Dr. Okombo, this court does not find any credible evidence that proved that the appellant sustained injuries that would warrant any such reconstructive surgery. Albeit the trial magistrate used the term *minor* soft tissue injuries which term was not used in the medical documents, it is clear from the evidence on record that the appellant sustained soft tissue injuries which were inflammation on the back caused by the lashings that he received from the 1st respondent. He was treated as an outpatient and going by the photographs taken by the father when the injuries were still fresh, there is no evidence of a cut wound or a tear. The medical Report by Dr. Okombo and the P3 form both assessed the degree of injuries as harm. Such soft tissue injuries cannot by any stretch of imagination be considered to be grievous harm as stated in the demand letter written by the appellant's counsel to the Respondents.

55. In **BB (a minor suing through his next friend and father GON) v Ragae Kamau Kanja[2019] Eklr** the Court of Appeal held:

> ***"The trial court in evaluating the injuries sustained for purposes of ascertaining the general damages relied upon the P3 filled after the accident. The learned judge in his evaluation of the injuries sustained by the appellant focused on the medical report prepared by Dr. Kinuthia. The judge correctly discounted this report. However, the judge did not address his mind, as the trial magistrate did, to the injuries sustained by the appellant as disclosed in the P3 form. For these reason, we are satisfied that the judge erred in setting aside and reducing the general damages awarded because he, inter alia, did not take into account the P3 form which was a relevant document in assessing damages."***

56. This court is aware of the many decisions wherein the courts have stated that where Respondents having opted not to call any witness, there was no evidence on record in support of their defence. See ***Kennedy Mwige Nyaga Vs Austin Kiguta & 2 others [2015] eKLR***, CA (Visram, Mwilu & Otieno Odek JJA) ; ***Beatrice Nthenya Sila Vs Ruth Mbithe Kirsira & 3 Others [2014] eKLR*** the court held that the Medical Report was not challenged by production of a contrary report.

57. However, as stated above, it is clear that the plaintiff must adduce evidence on a balance of probabilities that is credible and that which proves his case whether or not his case is controverted. I hold this latter view to be the correct view in law because it is not enough for a

party in a case which is not controverted to merely produce contradictory evidence and expect the court to rule in their favour. The evidence adduced must be credible and believable.

58. In the instant case, albeit the appellant pleaded injuries involving cut wound, and also produced a medical report recommending reconstructive surgery at a cost of Kshs 450,000/-, I am not satisfied that the appellant proved the necessity for reconstructive surgery. The P3 form which was filled only a day after the injury and the treatment notes do not show any tear. The P3 form is categorical that there was no tear. Further, I reiterate that the appellant has not demonstrated that he ever saw a physiotherapist or a plastic surgeon prior to visiting Dr. Okombo in 2017, about two years after the injury, to assess the need for the reconstructive surgery and the estimated cost thereof. In addition, PEx 12 is a receipt for drugs. It is dated 23/1/2017. There is no accompanying diagnosis to show for what ailment the drugs were being dispensed by Avenue Healthcare and neither does the receipt from Dr. Juma dated 22/4/2015 for consultation show the ailment for which the appellant was consulting the Doctor. No treatment notes were availed to support the payments on those two occasions.

59. Therefore, albeit the appellant so pleaded for the cost of reconstructive surgery, there was no credible evidence to prove the claim. Iam in agreement with the Respondents' counsel submissions that the medical report by Dr. Okombo made in 2017 two years after the assault does not reflect the injuries sustained by the appellant in 2015. Iam inclined to reject it and rely on the P3 form and the photographs produced in court together with the initial treatment notes from Yala Level 4 Hospital which show the injuries sustained to be inflammation, not cut wounds.

60. Furthermore, the extent to which this court can be bound by expert evidence was discussed in many cases among them: In **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988,** where the Court of Appeal held that expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

61. However, the status of opinion evidence was later dealt with in **Shah and Another vs. Shah and Others [2003] 1 EA 290** where it was held:

> ***"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct…The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field…However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony…The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so…If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court…Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."***

62. Later, the Court of Appeal, in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held:

> ***"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."[emphasis added]***

63. Applying the above principle to this case, albeit Dr. Okombo is an expert in the medical field and is described as a physician, on the weight that this court must attach to his expert opinion, which opinion contradicts the initial treatment notes and P3 form, the case of **Stephen Kinini Wangondu v The Ark Ltd [2016] eKLR** is illustrative. The court stated:

> ***"Expert testimony like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is not obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided: it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.***
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> ***While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of evidence which a court has to take into account. Four consequences flow from this:***
>
> > ***"Firstly, expert evidence does not trump all other evidence. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest important. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.***
> >
> > ***Secondly a judge must not consider expert evidence in a vacuum. It should not therefore be 'artificially***

separated' from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a Judge should consider all the evidence in the case, including that of experts, before making any findings of fact, even provisional ones."

64. This court concurs with the above holdings of the Court of Appeal that indeed, expert evidence should not outdo or trump all other evidence, and it should not be considered in a vacuum. The expert evidence must indeed be considered or evaluated in the context of other evidence. It follows that even if experts are called upon to assist the court in evaluating a complex matter, the said evidence is not binding on its own.

65. This court further observes that albeit the appellant pleaded for the Kshs 450,000 being the cost of future medical expenses, this prayer was conspicuously omitted from the final prayers and therefore it was not assessed by the court for payment of court fees. I have perused the court file and I note that the receipt for court fees paid on the filing of the plaint on 8/2/2017 is for Kshs 2660/- with special damages as pleaded in Paragraph b referring to paragraph 8B of the plaint attracting Kshs 580/- and general damages attracting Kshs 1500/. No doubt, the appellant evaded paying court fees for the figure of Kshs 450,000 by failing to disclose the amount in the prayers sought, leading to an understatement and underpayment of court fees on the cost of future medical expenses which is a special damage.

66. On the effect of failure to pay court fees for the claim, the law is clear that any person who files a plaint is required to pay court filing fees prescribed by the Chief Justice under section 10 of the Judicature Act (Chapter 8 of the Laws of Kenya) unless the person is exempted from paying such fees as a pauper under Order 33 of the Civil Procedure Rules. The Civil Procedure Act does not state the consequence of failure to pay court fees but section 96 of thereof implies that payment of court fees is an imperative for validity of a claim. However, failure to pay such fee does not ipso facto invalidate the suit. The section stipulates:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

67. Mativo J., in **Mombasa Cement Ltd v Speaker, National Assembly & Another NRB Pet. No. 177 of 2015 [2018] eKLR** observed that:

"The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees in time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.

68. This issue of non- payment of court fees was not raised before the trial court and neither was it raised on appeal by the Respondents. It is however important and that is why this court had to flag it out. This court that has made an observation hence the appellant did not have the opportunity of taking advantage of section 96 of the Civil Procedure Act to request the court to allow him to pay the filing fee. Therefore, if I were to allow this appeal on the claim for future medical expenses, I would have accorded the appellant the opportunity to pay the court fees on the said claim.

69. On the whole, I find and hold that the appellant herein did not prove on a balance of probabilities that he was entitled to an award of Kshs 450,000 being the cost of future medical expenses of reconstructive surgery. The medical Report by Dr. Okombo, coupled with other evidence on record does not support the assertion that the appellant sustained injuries that would warrant reconstructive surgery. The dismissal of the claim for the cost of reconstructive surgery in the sum of Kshs 450,000/- by the trial court is therefore justified and is hereby sustained for the reasons advanced hereinabove.

70. On the question of whether the trial court awarded the appellant general damages that were inordinately low compared to the injuries sustained, I have already found that the evidence adduced by the appellant show that he sustained inflammation on the back and left hand which were classified as soft tissue injuries and harm. As at the time the appellant was testifying on 21/3/2018, nearly three years had lapsed and there was nothing to demonstrate that the appellant was still seeing the doctors for medical attention following the injuries sustained. He also did not show that the lashes had worsened or that as at 2018, he still needed reconstructive surgery. The photographs which were produced showing fresh lashes were for 2015 a day after the assault. The appellant claimed that he could not swim because of the scars on his back which made him lose self-esteem as he would be asked on what had happened to him.

71. In **Kigaragari vs. Aya (1982 - 1988) I KAR 768, it was stated:**

"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of

increased costs for insurance or increased fees."

70. The principles upon which an appellate court may interfere with the findings of the trial court were set out in **Salim Zein and another vs. Rose Mulee Mutua, Civil Appeal No. 147 of 1994** (unreported); The court stated inter alia:

> ***"The Appeal Court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage."***

71. These are the correct principles and have been followed for many years now. Keeping them in mind I refer to the various authorities relied upon by both counsel in the subordinate court with regard to the kind of injuries the plaintiff /appellant suffered. The appellant's counsel sought for Kshs 2.0 million general damages for pain and suffering based on the decision in **Carolyne Wnjiku Karimi v Simon K. Tum &another [2012]e KLR** where an award of Kshs 1.8million general damages was made. The appellant relied on the same authority in this appeal. However, a perusal of that decision reveals that the injuries sustained by the plaintiff were very severe. They included multiple fractures all over the body parts numbering 24. By any imagination, that kind of authority cannot be compared to this case. I dismiss that authority to be irrelevant.

72. The Respondents submitted that the award of Kshs 100,000 is reasonable and commensurate to the injuries suffered, relying on Bonface ***Waiti &another v Michael Kariuki Kamau [2007] e KLR*** where the 1st appellant sustained soft tissue injuries following a road traffic accident involving: bruises and contusions on the neck, shoulders, back and upper arm. He was awarded Kshs 85,000 general damages for pain and suffering on 8th June 2007. Those injuries were more serious than the ones sustained by the plaintiff/appellant herein.

73. Therefore, on whether general damages in the sum of Kshs, 100,000/= for pain and suffering was inordinately low, the established principles are that an appellate court should not be quick to interfere with an award of damages which is an exercise of judicial discretion by the trial court unless:

> ***a. the award is manifestly excessive or inordinately low as to amount to erroneous assessment; or***
>
> ***b. the award emanates from an erroneous application of the law or principles applicable in assessment of damages or***
>
> ***c. the Judge failed to consider relevant factors and took into account matters he ought to have considered.***
>
> ***See the Administrator of H.H. The Aga khan Platinum Jubilee Hospital V Munyambu [1985] eKLR; Salim S. Zein S & Another V Rose Mulee Mutua [1997] eKLR.***

74. The legal authorities stand against interfering with the trial court's exercise of discretion in assessing damages except where there are sound grounds. Based on the above principles, I observe that there is no dispute that the injuries sustained by the appellant were classified as harm and were indeed soft tissue injuries. Albeit the trial court used the term, 'minor' injuries, the Medical Report did not indicate whether the soft tissues (harm) were minor or serious. However, the trial magistrate did not refer to any authority with similar injuries when he made the impugned award. The appellant testified and adduced evidence that as at the time of hearing of his case, he still experienced pain in the injured areas and that he had suffered low self-esteem as he could not swim without being asked about the scars on his back.

75. In **KIGARAGARI -VS- AYA (1982-88) 1 KAR 768 and CHEGE -VS- VESTERS (1982-88) 1 KAR, 1021** the court noted that:

> ***"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee ….."***

7. Further, the Court of Appeal in **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** observed that:

> ***"The assessment of damages in personal injury case by court is guided by the following principles: -***
>
> ***1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***
>
> ***2) The award should be commensurable with the injuries sustained.***
>
> ***3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***
>
> ***4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.***
>
> ***5) The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.'***

77. **The HALSBURY'S Laws of England 4th Ed. Reissue Vol 12(1) at page 348, paragraph 883** states that general damages for pain

and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff. In the circumstances of the plaintiff, it is not in dispute that he is entitled to damages for pain and suffering a fact not disputed by the defendant Respondent as there was no cross appeal filed.

78. As stated above, an award of damages is normally made to compensate the injured person for injuries sustained and must be within limits of decided cases and within limits of the Kenyan economy.

79. Before the trial court, the appellant's counsel cited ***Caroline Wanjiku Karimu V Simon K. Tum & Another [2012] eKLR*** where an award of Kshs, 1.8 m was made to the plaintiff who sustained very severe injuries including factures listed from ***a- x*** on the authority annexed to the submissions. I reiterate that that authority is not relevant or helpful to the court in assessing damages for injuries sustained by the plaintiff appellant herein and which were clearly ***assessed as soft tissue and harm.***

80. The injuries sustained by the plaintiff in the cited case were described as ***extremely severe multiple bone, joint and extensive serious soft tissue injuries***. Treatment would continue and aggressive physiotherapy was recommended.

81. That decision is not anywhere comparable to the injuries suffered by the appellant in this case to warrant an award of Kshs. 2 million shillings sought by the appellant. That authority had injuries dissimilar to the injuries suffered by this appellant to a very large and wide extend. However, apart from citing the authority of ***Osman Mohmmed & Another Vs Bundi*** on the principles guiding award of damages the trial court did not cite any comparable awards in cases similar to the appellant's case.

82. To that extend, the trial magistrate fell in error as there was no basis upon which he arrived at an award of Kshs. 100,000/= G.D. as there is no mathematical formula for calculating damages for pain and suffering.

83. In **Ndungu Dennis V Ann Wangare Ndirangu & Another [2018]e KLR** Ngugi Prof, J reduced an award of Kshs 300,000 general damages to Kshs 100,000 general Damages for pain and suffering in a claim where the Respondent sustained soft tissue injuries on the lower back, right leg and back- trunk. The injuries sustained by the appellant were comparable to those suffered by the 1st plaintiff in ***Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.***

84. Therefore, taking into account all the case law, circumstances under which the appellant sustained the injuries and the anxiety suffered by the appellant, an award of Kshs 150,000 would be reasonable award for pain, suffering and loss of amenities.

85. In the end, I allow this appeal only to the extent that I set aside the judgment of the trial court on general damages for pain suffering and loss of amenities. I however sustain the order of the trial court dismissing the claim for Kshs 450,000 for future medical expenses for want of proof.

86. The rest of the awards for special damages remain intact. The judgment is against the Respondents jointly and severally. The award of Kshs. 150,000/= will earn interest at court rates as from the date of judgment in the lower court until payment in full.

87. Considering the nature of the dispute herein between a former student and his former teacher and school, and the profuse unconditional apology offered by the 1st Respondent, I order that each Party shall bear their own costs of this appeal.

88. Special damages as awarded shall earn interest at court rates from date of filing suit in the lower court until payment in full.

89. Orders accordingly.

Dated, signed and Delivered at Siaya this 29th day of January 2020

R.E. ABURILI

JUDGE