



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 135 OF 2013

1. JOSEPH WAMBURU TUMBU.....1ST APPELLANT

2. SIMON KIMANI TUMBU.....2ND APPELLANT

VERSUS

MUENI NDUNDA KIILU alias MARRIETA MUENI NDUNDA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A. OPANGA, Resident Magistrate

delivered in RMCC No. 88 of 2011 – Yatta, Mueni Ndunda Mulwa vs Joseph Wamburu

Tumbu and Another on 21/11/2012)

BETWEEN

MUENI NDUNDA KIILU

ALIAS MARRIETA MUENI NDUNDA.....PLAINTIFF

VERSUS

JOSEPH WAMBURU TUMBU.....1ST DEFENDANT

SIMON KIMANI TUMBU.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 18th July, 2011, the Respondent herein instituted a suit for damages arising from road traffic accident which occurred on 25th May, 2011. On that day, according to the Respondent, she was travelling as a fare paying passenger in motor vehicle registration no. KAR 549B along Yatta-Mwala Road when the 2nd Appellant who was driving motor vehicle reg. no. KXZ 781 Leyland Lorry owned by the 1st Defendant negligently drove the said lorry that it collided with the vehicle in which the Respondent was travelling as a result of which the Respondent sustained injuries.

2. After setting out the particulars of negligence the Respondent particularised her injuries as deep cut on the head, cuts and bruises on the left hand, blunt injury on the left hand and cut on the right hand. As a result of the said accident the Respondent incurred a sum of Kshs 26,620.00 being special damages. She therefore claimed special damages, general damages, interests and costs of the suit.

3. In his judgement, the learned trial magistrate made factual findings on the injuries sustained. He found that from the medical report and p3 form annexed to the submissions, the Respondent sustained soft-tissue injuries and was expected to make full recovery with no permanent incapacity. Based on the authorities cited and the inflation, he proceeded to award Kshs 160,000.00 in respect of pain and suffering and special damages of Kshs 25,370.00. She however only applied the agreed contribution to the general damages and arrived at a total figure of

Kshs 153,370.00 with interests and costs.

4. It was submitted on behalf of the appellant that the trial court made an excessive award considering the injuries suffered by the Respondent herein. In the present matter, the Respondent had sustained Blunt trauma lower back, Blunt injury left arm and Cut on the right hand which were termed by **Dr. Kimuyu** as soft tissue injuries and that the Plaintiff was expected to make full recovery. According to the Appellant, the authorities relied on by the Respondent in their submission did not have comparable injuries as the injuries by the Respondent. In regard to general damages, the Respondent relied on an authority that had severe head injuries than the injuries sustained by the Respondent herein. The authorities by the appellant were more comparable and court should have been guided by the same.

5. It was submitted that it is now trite law that in assessment of general damages, the general method of approach should be that comparable awards should as far as possible be compensated by comparable awards. To the Appellants, the award of Kshs. 160, 000/ as opposed to the proposed Kshs 70,000.00 was inordinately such that no reasonable court could have awarded. In support of the submissions, the Appellant relied on **Robbert Ngari Gateri vs. Maningo Transporters. [2005] eKLR** and **Sokoro Saw Mills vs. Grace Nduta.**

6. According to the Appellant, it would be noted that the injuries stated in the medical report vary from those pleaded by the Respondent. While the plaint states that the Plaintiff blunt trauma lower back, blunt injury left arm and cut on the right hand, the medical report states that the plaintiff sustained cut wound on the forehead, cut on the left scalp parietal region, bruises of the left forearm, cut wounds right elbow and blunt injury to the chest. It was however submitted that the above injuries are different and more than the pleaded injuries and since it is trite law that a party is bound by its pleadings, the Respondent and the trial court cannot rely on a medical report that shows different injuries from those that have been pleaded. The Plaintiff, if he wanted the court to rely on the medical report, ought to have amended her pleadings which was not done. It was therefore submitted that the trial court while making her judgment relied on injuries as per the medical report, which has more injuries and not the pleadings. By so doing the court took into consideration matters she ought not to have considered hence arriving at an award that was excessive.

7. In light of the foregoing submissions, the Court was urged to consider the injuries sustained as per the pleadings vis-à-vis what the trial magistrate awarded and make a finding that the award was too high to warrant the Appeal and award a lower amount of Kshs. 70, 000/=. The Appellants also prayed for the costs of the Appeal.

8. On behalf of the Respondent it was submitted that as a result of the said accident, the Respondent sustained deep cut on the head, cuts and bruises on left hand, blunt injury left arm; and cut on the right hand which injuries were confirmed by the P3 Form and Medical Reports by **Dr. Kimuyu** which were admitted onto the record without calling the makers thereof by the consent of both parties. Their contents are therefore not disputed. Further, no evidence to the contrary was ever produced by the Appellants.

9. In the Respondent's view, the trial Court properly directed itself based on the Plaintiff's/Respondent's injuries and documents and the case law attached to the Plaintiff's/Respondent's submissions which also supported the Plaintiff's/Respondent's case. It was therefore submitted that the sum of Kshs. 160,000/- awarded by the trial court is not excessive in the circumstances and this Honourable Court should not disturb the award as it is not inordinate high to represent an erroneous estimate. The award was fair and reasonable based on the injuries sustained by the Plaintiff/Respondent based on **Leah Nyaguthii Kamunya vs. Kenya Broadcasting Corporation Nairobi HCCC No. 1128 of 1993** and **Douglas Mwirigi Francis and 2 others vs. Andrew Miriti HCCC No. 32 of 2005.**

10. As regards special damages, it was submitted that though the Plaintiff/Respondent pleaded in her Amended Plaint Kshs. 26,620.00, the trial court held that only Kshs. 25,370/- was proved by the receipts admitted into the record by consent of the parties and that no evidence to the contrary was presented by the Appellants. In view of the submissions the Respondent averred that it is clear that the Appellants have not established any case or evidence to disturb the awards awarded by the trial court. Further it is clear that the trial court was not misdirected in the awards under the general damages and special damages as the same were not inordinately high and thus the Appeal fails on all grounds and he prayed that the same be dismissed with costs to the Respondent.

Determination

11. In this appeal, it is clear that the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.**

12. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

13. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

14. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

15. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect... A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

16. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

17. The record of the proceedings before the trial court reveal a rather unsatisfactory state of affairs. The record does not show the existence of a judgement on liability and how the matter was to proceed thereafter. However, the submissions made both before the trial court and this court reveal that there was a consent recorded in which liability was apportioned in the ratio of 80:20 in favour of the Respondent. It would seem that there were a number of cases arising from the same accident.

18. That therefore calls for some directions on how the proceedings are to be recorded. Where parties record a consent on liability, it is always procedural that that consent appears on the record of the proceedings since such a consent ought to be translated into a judgement otherwise the same remains as a simple letter requesting for judgement and is not itself a judgement. In other words, a consent letter ought to be endorsed by the court and its contents reflected as part of the proceedings. Secondly, where there is a consent judgement on liability in a series of matters but the consent is entered in one file but is to apply to all the related files, unless there is a consolidation of matters in which event one judgement is to be delivered, the said consent ought to be reflected in all the related files so as to complete the records in all the related matters.

19. Though the record of the trial court in respect of the mater appealed from in this appeal, does not indicate how damages was to be assessed, mercifully and coincidentally, the records in a related matter being Kithimani SRMCC No. 86 of 2011 was availed and though it similarly has no judgement, the proceedings indicate that the parties agreed that damages be assessed in accordance with the medical reports attached to the submissions.

20. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to throw at the

court medical reports without bothering to confirm their consistency. To my mind once parties agree on liability they ought to endeavour to harmonise the various medical or expert reports on record and agree at a common ground regarding the basis upon which assessment of damages is to be undertaken. If they are unable to do so, the makers of those reports ought to be called where the reports are conflicting for cross-examination. It is however unfair to the court to just throw all manner of reports at the court and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by **Ringera, J** (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

“the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant’s state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise.”

21. The same Judge in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** held that:

“Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident.”

22. In my view parties and their counsel ought not to just throw medical reports or expert opinion reports for that matter which are divergent in material aspects without calling the makers thereof. This was the position of the Court of Appeal in **Auni Bakari & Another vs. Hadija Olesi Civil Appeal No. 70 of 1985** where it held that it is desirable to call a doctor to explain the discrepancy in a medical report.

23. The procedure of admitting in evidence expert opinion reports which are not substantially the same is, in my view, a short cut that ought not to be permitted in litigation. As was held by **Ringera, J** (as he then was) in **David Ndung’u Macharia vs. Samuel K Muturi & Another Nairobi HCCC No. 125 of 1989:**

“...an order that a medical report be agreed, or in the alternative that medical reports be exchanged, and that the attendance of doctors as witnesses should be dispensed with ought never to be made as a matter of form. The Court must be satisfied by the applicant for such an order that undue delay or expense would be caused in the suit unless the attendance of doctors is dispensed with... There are cases in which the order may be useful, as for instance, where a man has broken his leg and the doctor is only required to say how long the man has suffered and that there is no permanent injury. There may be cases in which there is no permanent injury and one does not require a doctor to tell one that, if there is no disagreement about it...However, in a case where prognosis is an important matter, it is most desirable that a doctor, or doctors should be present in court to answer any questions which the Judge may wish to ask and this is because we ought not to discourage the making of that order in proper cases, but the direction ought not to be included as a matter of course. The master to the Registrar should consider whether the case is suitable for hearing with a report and if it is, the order ought to be made and the parties should observe it...The second issue is that it is only an agreed report that can properly be admitted in evidence without calling the maker. The mere exchange of medical reports does not render such report or reports admissible without calling the maker(s) unless one or both of them have been agreed. A direction that medical reports be exchanged is no more than an order in the nature of mutual discovery of medical evidence. It must be understood that orders that a medical report be agreed and the same be admitted in evidence without calling the maker are made for the purpose, not of hindering the administration of justice, but of assisting it. If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately embarrassed between the two views and the two statements. The whole object of the type of order is to ensure that matters of medical fact, and matters of medical opinion shall if possible be agreed by the medical men and that is the object and the sole object of orders of this kind, and indeed no order could achieve anything more. The practice was certainly never intended to admit of inconsistency and differing medical points of view being put before the Judge and described as agreed medical reports. You cannot have an agreement on two inconsistent statements of fact, and the phrase “agreed medical report” means, and means only a report where the facts stated are agreed as true medical opinions expressed and accepted as correct. In the normal case in pursuance of an order of this kind, the doctors on the two sides would meet and embody their views in a document which they both may sign and that is very convenient, and would save a great deal of trouble and expense in many cases, but it is not to be understood that orders of this kind are to be made as a matter of course. It would depend very much on the nature of the case and the nature of the injuries, and whether it will save trouble and expense and in the long run by dispensing with the doctors at the hearing. On an interlocutory application some discretion must be exercised by the master who is making the order as to whether it will be a saving of expenses to make this type of order, but it must not be taken that is all that is necessary. The case may be one where the report of the first doctor is accepted by the other doctor. If on the other hand there are likely to be points of controversy, then if the agreement is to be completed they can only solve them by coming to an agreement, and if they cannot come to an agreement, there can never be an agreed report and that is the object of this procedure...In short it is for the parties’ doctors (and not the parties themselves, or their advocates) to agree on a medical report and if the doctors have not agreed by either adopting one report or jointly authorising a single report there is no agreed report...In the circumstances of this case, the court is satisfied that there was no agreed report and accordingly the orders made at the hearing of the summons for directions did not relieve the plaintiff off the burden of calling the doctor to testify and as he did not come to testify, his report is held to be inadmissible in evidence and the court will not look at it for any purposes in the trial. P3 form is admissible in evidence as an entry in a public record stating a relevant fact within the contemplation of section 38 of the Evidence Act and the court will bear its contents in mind in assessing the damages.”

24. Where parties intend to rely on medical reports only they ought to confirm that the same are substantially the same in terms of injuries sustained. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won’t land you in a ditch. In **Lehmann’s (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in

prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”

25. However, once the parties produce the same by consent the court has no option but to make the best out of them. In Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003, the Court of Appeal held that:

“The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as “No qualifications disclosed; the doctor is not a consultant”. If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant’s claim as to the nature of the injuries he had sustained as a result of the accident...The parties’ agreement on production of documents did not specify which documents were to be produced and which ones were not to be admitted. The Court cannot therefore interfere with the parties’ agreement on production of documents.”

26. The words of Byamugisha, J in Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987 however need to be taken note of. In that case the learned judge held, citing *Sarkar on Evidence* 12th ED pp 506.R. that:

“Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion.”

27. I have considered the submissions made on behalf of the parties herein. In his judgement, the learned trial magistrate found that the Respondent had sustained cut wounds on the forehead, cut on the left scalp parietal region, cut wound on the right elbow, bruises on the left forearm and blunt injury to the chest. However, in the plaint, it was pleaded that the Respondent sustained blunt trauma to the lower back, blunt injury to the left forearm and cut wound on the right hand. Clearly the injuries pleaded were inconsistent with those in the medical report.

28. It was therefore held in M N M vs. D N M K & 13 Others [2017] eKLR that:

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However that was clearly not the case in this appeal.

29. The Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3, quoted with approval from an article by Sir Jack Jacob: *The Present Importance of Pleadings* published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item

called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

30. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

31. The Supreme Court of Kenya in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** on its part held that: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

32. Therefore, without amending the plaint it was a misdirection for the learned trial magistrate to have relied on the medical report whose contents were at variance with the pleadings. The law is clear that a party is bound by his pleadings despite the evidence. The most that could be done was to base the decision on the pleadings taking into account the procedure which the parties had adopted.

33. I have considered the authorities relied upon by the Appellant and I find them irrelevant taking into account the time lapse between the time they were delivered and when the judgement appealed from was delivered. I find the decisions relied upon by the Respondent more current. While I may have awarded a different figure from the one awarded, I am not satisfied that the award was manifestly excessive as to warrant interference.

34. It is however, my view that special damages ought to have similarly been subjected to the agreed contribution and the failure to do so amounts to an error in principle.

35. Accordingly, while I reaffirm the judgement, I reduce the special damages to Kshs 20,296.00 having taken into account the agreed contribution. Save for that the appeal fails. Since the appeal has been allowed on a ground which was not taken up, the Respondent will have half the costs of the appeal.

36. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of April, 2020.

G V ODUNGA

JUDGE

Delivered at 9.30 am in the absence of parties who were duly notified to them through their known email addresses.

CA Josephine