



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NUMBER 24 OF 2017

BONIFACE KINYUA KATHURI.....APPELLANT/APPLICANT

VERSUS

DAVID MUNYOKI.....RESPONDENT/DEFENDANT

(Formerly of CMCC.NO.354 OF 2012 Kitui Law Court being an appeal from the Judgment of Hon.R.Ombata –Resident Magistrate delivered on 12th September, 2017)

J U D G M E N T

1. This is an appeal lodged by **Boniface Kinyua Kathuri**, the **Appellant** herein against the judgement delivered in **Kitui Senior Principal Magistrate's Court Civil Case No.354 of 2012** delivered on 12th September, 2017. The appeal relates to the decision made by Hon. R.Ombata, Resident Magistrate in respect to a suit that had been filed against **David Munyoki**, the **Respondent** herein and a Third Party who was later found not liable to a road traffic accident involving the **Respondent's** Motor Vehicle Registration No. **KBP 367R** and Motor Cycle Registration No. **KMCT 413A**. The **Appellant** was a pillion passenger in the said motor cycle.
2. A brief summary of the facts or evidence presented to the trial court indicates that there was a funeral procession on 28th July 2012 from Jordan Mortuary within Kitui Town and when the procession approached a junction between Kitui A.C. Church and Kitui Central Primary School, the **Appellant's** oncoming Motor Vehicle Registration No.**KBP 367R** lost control and knocked the Motor Cycle Registration **KMCT 413A** aboard which the **Appellant** was riding and caused him injuries.
3. One of the issues for determination before the trial court was to determine who was to blame for the accident and to what extent. The other issue was the question of quantum of damages payable on the injuries suffered by the **Appellant**.
4. The trial court upon the assessment of evidence tendered found that the **Respondent** was **90%** liable for the accident while the **Appellant** was apportioned **10%** blame for the occurrence of the accident. On quantum, the trial court found that the **Appellant** had failed to specifically plead the injuries sustained in the accident and consequently held that the claim of general damages could not be sustained.
5. The **Appellant** felt aggrieved by finding of the trial court and lodged this appeal raising the following grounds namely:-
 - i. **That the learned Magistrate erred in law and in fact by holding that the particulars of injuries in the medical report were markedly by different from the particulars of injuries in the pleadings.**
 - ii. **That the learned Magistrate erred in law and in fact by directing herself on wrong principles and not addressing herself on the correct issues from pleadings filed.**
 - iii. **That the learned Magistrate erred by not making a determination on the quantum.**
 - iv. **That the trial Magistrate erred by not considering contemporaneously the Appellant's pleadings, oral evidence, documentary evidence and submissions.**
6. In his written submissions through learned counsel **M/s Mulu & Company Advocates** the **Appellant** submits that the duty of this court as an Appellant Court of the first instance, it is obliged to consider the evidence adduced before the trial court, evaluate and draw own conclusion. He has cited the decision of **Selle & Another -VS- Associated Motor Boat Co. Ltd and Others (1968) E.A. 123** to support his submissions.
7. The **Appellant** at the trial testified on how the accident and how he sustained the following injuries;

- (a) Injuries to the left hand
- (b) Injuries to the right leg and hip joint.
- (c) Injuries to the left side of the head.

8. He contends that he tendered sufficient evidence to prove the above injuries citing the treatment notes from Kitui General Hospital, P3 form and the medical report tendered as PEx.1, 2 & 9 respectively. He adds that he called the doctor (**Pw3**) who in his contention testified and tendered the medical report indicating that he suffered the following injuries, namely;

- (a) Bruises on the forehead.
- (b) Bruises on both limbs.
- (c) Bruises on the left knee and
- (d) Blunt injury on the lower limb with bruises.

9. It is the **Appellant's** position that the medical evidence he adduced was neither challenged nor controverted by the **Respondent**. He avers that the injuries pleaded in the plaint are the same injuries he proved during trial.

10. The **Appellant** further submits that the parties had agreed on liability in the ratio of 90%:10% in his favour and that the only issue for the trial court to deal with was the quantum of damages payable. He faults the trial court for failing to consider the pleadings and the evidence tendered in its judgment.

11. He submits that the trial magistrate was misguided when it failed to award him damages for the injuries suffered. He has cited the decision of **Ndungo Dennis -VS- Ann Wangari & Another [2018] eKLR** to buttress his submissions.

12. He further submits that though there is no scientific method of quantifying damages, comparable injuries ought to attract comparable awards without forgetting the fact that with the passage of time, inflation kicks in which needs to be factored in when quantifying damages payable. He has cited the decision in **Martin Mungi -vs- AG (Nbi HCCC No.791 of 1999)** and **Catherine Wanjiru Kingor & 3 Others – VS- Libson Theuri Gichubi [2005] eKLR** where the plaintiffs were awarded kshs.300,000/= and 450,000/= respectively to fortify his prayer that he should be awarded kshs.450,000/= for the injuries he sustained.

13. On the other hand, the **Respondent** has opposed this appeal and supports the finding of the trial court. He contends that liability was settled at the ratio of 90% to 10% in favor of the **Appellant**.

14. According to the **Respondent** the trial court properly directed itself in not making any award because in his view, the **Appellant** was not entitled and the reason he gives is that he did not specifically plead the actual injuries he suffered. According to the **Respondent**. The **Appellant** in his plaint pleaded the following injuries namely: -

- (a) Brain concussion.
- (b) Deep cut wound on the frontal head.
- (c) Deep cut wounds on both upper parts of the humerus.
- (d) Deep cut wounds to the knee joints.
- (e) Deep cut wounds on the lower mid tibia/fibula right leg.

15. The **Respondent** submits that the above listed injuries varied markedly with the injuries indicated in the original medical report tendered and in his view the **Appellant** did not prove the injuries he had pleaded. He contends that parties are bound by their pleadings and has cited the decision in **Treadsetters Tyres Ltd. -VS- Wekesa Wepukhulu [2010] eKLR** to support his submissions. He also relies on the provisions of **Order 2 Rule 4** in faulting the **Appellant** for omitting to specifically plead the injuries suffered. He contends that the prayer to be awarded ksh.450,000/= lacks basis because the **Appellant** never sought to amend his pleadings to reflect the actual injuries he suffered.

16. I have considered this appeal, the grounds raised and the submissions offered. I have also considered the response made. It is not contested that the issue of liability was well settled. Liability was apportioned at the rate of 90%:10% in favour of the Appellant which meant that the Respondent was found 90% liable for the accident and that is not contested in this appeal.

17. The only issue for determination is whether the **Appellant** pleaded specifically the nature of injuries suffered as required by **Order 2 Rule 4** of **Civil Procedure Rules**. For purposes of clarity **Order 2 Rule 4 Civil Procedure Rule** provides as follows:-

“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable act of God, any relevant statute of limitation or any fact showing illegality _ _”

The rule expressly states that the purpose of specific pleading is to enable the opposite party defend the claim and avoid an ambush or taking the other party by surprise.

18. The Court has perused through the original plain dated 20th November, 2012 and the Amended Plaintiff amended on 12th February, 2016. The specific injuries pleaded in both the original pleading and the amended one are as follows:-

- (a) Concussion of the brain.
- (b) Deep cut wounds on the frontal head.
- (c) Deep cut wounds on both upper parts of the humerus.
- (d) Deep cut wounds to the knee joints.
- (e) Deep cut wounds lower mid tibia/fibula right leg.

19. The above injuries, are what was specifically pleaded and as it is trite, the Appellant being the Plaintiff or Claimant has an obligation to specifically prove the listed injuries to the required standard in law (in this instance on a balance of probabilities). Looking at the proceedings from the lower court, the **Appellant** testified and described the injuries suffered as follows:

“Sustained injuries to my left hand, left leg and hip joint and left side of the head.” The documents tendered to prove the injuries suffered are as follows

- (i) P3 (P Ex. 2)
- (ii) Treatment sheet (PEX.2)

The **Appellant** further told the trial court that he still had difficulty in walking and lifting heavy objects owing to the accident and that he saw Dr. Kamulu who prepared a medical report. That medical report was however not tendered in evidence.

20. The record of proceedings shows that the **Appellant** relied on the P3 (tendered as P.Ex.2) and treatment sheet from Kitui District Hospital (P Ex.3) to establish and prove the nature of injuries suffered. Going by the P3 the following injuries are listed and described as follows:-

- (a) Bruises on the frontal part of the head (face).
- (b) Bruises on the both upper part of the hands and humerus.
- (c) Bruises on the knee joint and lower mid tibia/fibula of the right leg.

The treatment card from Kitui District Hospital (PEX.3) listed the following injuries.

- (i) Facial
- (ii) Wrist Bruise
- (iii) Left knee lacerations
- (iv) Upper limbs limit movements.

21. This court has considered the two sets of injuries as specifically pleaded by the **Appellant** in his plaint as opposed to the injuries listed and described by the medical documents cited above and it is clear that comparing the two sets of injuries one cannot fail to notice a remarkable difference. The injuries that the **Appellant** pleaded in his pleadings are far more serious than the injuries listed in the documentary evidence. For one he had pleaded that he suffered concussion of the brain but none of the documents tendered in evidence mentions concussion of the brain. The other injuries to that were described as *“deep cuts”* are also not mentioned which poses the question: can a party plead one set of injuries but goes ahead to establish different nature of injuries? The answer to that question is obviously in the negative if the law is anything to go by.

22. The trial court must have grappled with this question because in its judgment he found that the injuries pleaded in the Plaintiff *“differed markedly with the injuries established and proved at the trial”*. The trial court cited the decision in *Treadsetters Tyres Ltd.* (supra) which decision has been relied on by the **Respondent** in this appeal, in finding that the **Appellant** herein had failed to plead the nature and extent of injuries suffered. The finding of the trial Magistrate in my view cannot be faulted because it is firmly anchored in the law. As observed above under **Order 2 Rule 4** the law clearly stipulates that the nature of injuries suffered by a Plaintiff **must be specifically pleaded** and the operative word in that rule is **“must”** which means that it is a mandatory requirement. As aptly stated in the decision of Ibrahim J *“Treadsetters Tyres Ltd”*,

“in cases of tortious claims based on negligence, injuries and special damages must be specifically pleaded. They cannot be imagined or inferred. The court’s road maps 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 claims. One must plead the nature and extent of injuries suffered. This is a mandatory requirement of the law.....” (emphasis added).

23. This court takes a similar position because a party cannot plead for instance that he suffered certain injuries on the head but during trial and out of the blue goes ahead to list different injuries suffered on the stomach. The omission in my view is fatal. Allowing parties to depart from his/her pleadings is undesirable and a violation of the rules because the result would be to expose the opposing party to unfair trial. A defendant in tortious claims based on negligence should be able to know specifically what he/she is going to defend in court. When a party pleads specifically the nature and the extent of injuries like the **Appellant** clearly did at the trial, but goes on to prove different nature of injuries that amounts to an ambush the same is not only unfair but a violation of the rule cited above. In that respect the **Appellant** really cannot blame the trial Magistrate for applying the law in the manner he did. He can only blame himself for the omission because he had the chance to amend his pleadings if he discovered that the nature and extent of injuries pleaded were not in tandem with the medical documents he was relying on.

24. It is my considered view that the obligation placed by law on the **Plaintiff** in claims based on tort of negligence to specifically plead the nature and extent of injuries means that a plaintiff cannot make a general claims and leave gaps to be filled by assumptions by the defendant or the court. That would be a risky venture and omission. A pleading is everything because a party is bound by his/her pleadings. Where gaps are discovered, the law provides windows/ avenues to seal the loopholes in his/her pleading which is through amendments.

25. This court is not persuaded that because the **Appellants** medical evidence was not challenged or controverted by the **Respondent**, he was at liberty to depart from his pleadings. A party as observed above is always bound by his/her pleadings whether the same is challenged/ controverted/defended or not. The rules of procedure and the law do not change. The onus or proof remains and the trial court must be satisfied that the case has been proved to the required standard in law.

This position also applies where a consent on liability has been entered like it was done in this instance. Unless there is consent expressly recorded on quantum, a Plaintiff is required to prove his/her claim on injuries and/or damages notwithstanding the fact that a consent on liability has been reached between the parties.

26. In the end and for the reasons aforestated this court finds no merit in this appeal. Having re-evaluated and re-assessed the evidence tendered *visa viz* the pleadings filed I have come to the same conclusion reached by the trial court. The **Appellant** simply failed/omitted to specifically plead the actual extent and nature of injuries suffered. He pleaded one set of injuries and went ahead to prove a markedly different set of injuries. That as observed above is not tenable in the premises. The same is disallowed with costs to the **Respondent**.

Dated, Signed and Delivered at Kitui this 19th day of October, 2020.

R. K. LIMO

JUDGE