REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 499 OF 2016

B.M. SECURITY LIMITED &

LAWRENCE KAGEMA MWANGI.....APPELLANTS

VERSUS

MUSA PYEGON ATONG'ORENG.....RESPONDENT

(Being an appeal from the entire Judgment and Decree of Hon Peter Muholi, Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani Commercial Courts in CMCC No 315 of 2012 delivered on 20th July 2015)

JUDGMENT

INTRODUCTION

1. In his decision delivered on 20th July 2015, the Learned Trial Magistrate, Hon Peter Muholi, Resident Magistrate (RM) entered Judgment in favour of the Respondent herein against the Appellant herein for the sum of Kshs 2,222,000/= made up as follows:-

General Damages	**Kshs 2,000,000/=**
Special Damages	**Kshs 97,000/=**
Future medical Expenses	**Kshs 125,000/=**
	Kshs 2,222,000/=

plus costs and interest. Interest on general damages was to accrue from the date of filing suit till payment in full while special damages were to attract interest from the date of filing suit till payment.

2. Being dissatisfied with the said decision, the Appellants filed the Memorandum of Appeal dated 27th July 2016 on 8th August 2016. They relied on seven (7) Grounds of Appeal.

3. Their Written Submissions were dated 14th December 2018 **(sic)** and filed on 13th December 2018 while the Respondent's were dated 6th February 2019 and filed on 8th February 2019.

4. Parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited**

[1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having considered the parties' Written Submissions, it was evident to this court that the issues that had been placed before it for hearing and determination were:-

> **1. Whether or not the Learned Trial Magistrate erred in having found the Appellants wholly liable for the accident;**
>
> **2. Whether or not the Learned Trial Magistrate awarded general damages that were so inordinately high and manifestly excessive so as to have warranted the interference by this court;**
>
> **3. Whether or not the Learned Trial Magistrate erred in awarding the Respondent future medical expenses.**
>
> **4. Whether or not the Learned Trial Magistrate erred in awarding the Respondent special damages in the sum of Kshs 97,000/=.**

8. The Court therefore found it prudent to address the said issues under the following separate and distinct headings:-

I. LIABILITY

9. Grounds of Appeal Nos (1) & (2) were dealt with together as they were related.

10. The Appellants submitted that the accident herein was a head on collision between two (2) motor vehicles and that the evidence that was adduced was not sufficient to have found the Appellants to have been a hundred (100%) liable for the said accident.

11. They pointed out that during Cross-examination, the Respondent stated that the motor vehicle coming from the opposite direction had full lights on and he could not therefore state with certainty whether the motor vehicle he was travelling in was on its lane or the speed the other motor vehicle was being driven at.

12. It was their averment that they were found wholly liable for having caused the accident merely because the other motor vehicle was not brought to court but not on the facts of the case.

13. In this regard they relied on the case of **Easy Coach Ltd vs Dinah Habwe Omutsali [2015] eKLR** where the court therein held that:-

> **"In the absence of other independent witness it was the duty of the court to use its discretion based on the evidence on record and proceeded to set aside 100% liability and apportioned liability on equal basis between the two vehicles involved in the accident".**

14. They therefore urged this court to set aside the court's finding on liability and find them fifty (50%) per cent liable for the accident herein notwithstanding that the owner of the other motor vehicle had not been joined in the proceedings in this court.

15. On his part, the Respondent argued that in excising its discretion to apportion liability, the court must consider causation and blameworthiness as was held in the case of **Sospeter Ndungu Kamau vs Charles Mageto [2006] eKLR.**

16. It was his submission that he particularised in his Plaint, the negligence of the 2nd Appellant herein, and that consequently, the 1st Appellant was vicariously liable for the negligence of the 2nd Appellant.

17. He averred that the 2nd Appellant failed to exercise due care and attention more so as he was on normal patrol. It was his further submission that the above notwithstanding, even if the 2nd Appellant was responding to an emergency, he was still expected to exercise due care and attention because he was trained in both instances and there was therefore no justification for him to have driven carelessly.

18. He further contended that the Appellants did not Cross-examine him on not wearing a seat belt and that in any case, they did not file any witness statements or call witnesses to support their assertion that he was not wearing a safety belt at the material time of the accident.

19. He also averred that the Appellants had the power to enjoin the owner of the other motor vehicle with a view to having the issue of liability between them and the owner of the other motor vehicle determined but they did not do so.

20. He was emphatic that his evidence remain uncontroverted as the Appellants did not call any witnesses. In this regard, he placed reliance on the case of **Mary Njeri Murigi vs Peter Macharia & Another [2016]) eKLR** where it was held as follows:-

> **"….once again, no attempt was made by the defendants to call any evidence to prove those acts of negligence on the part of the bus driver/owner. Neither did the defendants enjoin the said bus owner as a third party for liability to be determined against the said bus determined against the said bus owner. However the record is clear that the defence closed their case**

without calling any evidence…"

21. A perusal of the Respondent's Plaint that was dated 19th December 2011 and filed on 27th January 2012 showed that on 17th August 2019, the 2nd Appellant negligently drove, managed and/or controlled motor vehicle Registration Number KAX 617P (hereinafter referred to as the " 1st subject Motor Vehicle") that he caused it to collide with Motor Vehicle Registration No KAJ 475X (2nd subject motor vehicle) as a result of which he sustained serious injuries.

22. The Respondent adopted his witness statement that was dated 19th December 2011 and filed on 27th January 2012. His testimony was that he was a passenger in the 1st subject Motor Vehicle in the normal course of his patrol duties as an employee of the 1st Appellant.

23. He was categorical that the 2nd Appellant was to blame for having caused the accident and averred that he was charged with a criminal **(sic)** offence and fined Kshs 5,000/=.

24. During his Cross-examination, he did, as the Appellants submitted, testify that the 2nd subject Motor Vehicle had its full lights on and that he could not tell whether they were on their right lane or the speed of the other motor vehicle.

25. This court looked at the Police Abstract Report and noted that it was correct as the Respondent told the Trial Court, that the 2nd Appellant was convicted. This pointed to the negligence on the part of the 2nd Appellant. If the police had found that he and the driver of the other motor vehicle had caused the accident, then they would have charged both of them with a traffic offence(s).

26. This court agreed with the Respondent that in the absence of the evidence by the Appellants, his evidence remained uncontroverted. Nothing would have been easier than for the Appellants to have enjoined the owner of the 2nd subject Motor Vehicle if they held the view that he was also to blame for the accident herein. Left as it was, the Respondent had implied that he did not hold the driver of the 2nd Motor Vehicle liable and that he was not looking up to him for him for compensation.

27. In this regard, this court considered the case of **Moses Theuri Ndumia vs I.G. Transporters Ltd & Another [2018] eKLR** where the Court of Appeal cited with approval the case of **Civil Appeal No 315 of 2012 Kenya Power & Lighting Co Ltd vs Pamela Awino Ogunyo** where the Court of Appeal differently constituted, rendered itself as follows:-

> **"…A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Sections 107 – 109 of the Evidence Act which place a legal burden of proof or what may be called evidential burden of proof on the party making the assertion. In Janet Kaphiphe Ouma & Another v Marie Stopes International Kenya (Kisumu) HCCC No. 68 of 2007 Ali-Aroni, J citing Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 had this to say of the said provisions of the Evidence Act:**
>
> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence…"**

28. In that case, the Court of Appeal determined that the case of **Baker vs Harborough Industrial Co-operative Society Limited [1953] I WLR 1472** which was on all fours with the case of **Easy Coach Ltd vs Dinah Habwe Omutsali** (Supra) was not applicable.

29. In the case of **Baker Harborough Industrial Co-operative Society Ltd** (Supra), it had been held as follows:-

> **"Everyday, proof of collision is held to be sufficient to call on the Defendant to answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitantly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw distinction between them."**

30. Accordingly, having considered the parties' Written Submissions, this court found and held that the Learned Trial Magistrate arrived at a correct conclusion that for the reason that the Appellants did not call witnesses, the Respondent's evidence remained uncontroverted and that the same did not warrant any interference by this court. The same will therefore remain undisturbed.

31. In the premises foregoing, grounds of Appeal Nos (1) & (2) were not merited and the same are hereby dismissed.

II. QUANTUM

A. GENERAL DAMAGES

32. Grounds of Appeal Nos (3), (5) and (7) were dealt with together as they were related.

33. The Appellants submitted that general damages should be within limits that Kenya could afford as was held in the case of **Nyambura Kigaragari vs Agrippina Mary Aya [1982-1988] I KAR.**

34. They also referred to the case of **Rahima Tayah & Another vs Anne Mary Kimani (1987-88) I KAR 90** where it was held that comparable injuries should be compensated by comparable towards to secure some uniformity in the general method of approach.

35. They submitted that the sum of Kshs 2,000,000/= was too excessive for a fracture of the femur with displacement of the fragment (non-union fracture), cut wound, nasal septal region at the angular left eye and big laceration right knee below knee joint that was sustained by the Respondent herein.

36. They also relied on the following cases to support their argument that the Respondent ought to have been awarded Kshs 500,000= as commensurate general damages:-

1. Paul Njoroge vs Abdul Sabuni Sabonyo (2015) eKLR.

In 2015, the Court of Appeal made an award of Kshs 500,000/= general damages where the claimant sustained multiple comminuted fractures of the right femur leading to a shortening of the leg by 5 cm, displaced fracture of the left shoulder blade, swelling and stiffened leg, several surgeries over a period of two months and had metallic implants inserted. He had also suffered severance of major blood vessels.

2. **Kenny Nyaga Mboi vs mash Bus Services [2016] eKLR**

The court made an award of Kshs 500,000/= general damages where the claimant had sustained compound fracture of tibia fibula, soft tissue injuries to the left knee, soft tissue injuries to the chest, head and neck, bruises above the right eye, loss of substantial amount of blood, had plates and screw which were pending removal. Disability was assessed at fifteen (15%) per cent.

3. David Kimathi Kaburu vs Dionisius Mburugu Itirai [2017] eKLR

The court sitting in Meru made an award of Kshs 630,000/= general damages to a claimant who had sustained fragmental fracture of mid shaft femur and intertrochanteric fracture femur. He healed with a wobbly gait with a limp on the right lower limb, severe pain on the right hip joint and entire limb and post-traumatic consequences.

4. Ibrahim Kalema Lewa v Esteel Co Ltd [2016] eKLR

The court made an award of Kshs 300,000/= general damages to a claimant who had sustained intertrochanteric fracture of the left femur and physical and psychological pains resulting to 25% permanent incapacity. He was not expected to regain normal functional capacity of his limb.

37. On his part, the Respondent submitted that in determining general damages, the factors to be considered in awarding the same vary with circumstances in each case as was held in the case of **Eric Onyango Okumu vs SDV Transami (K) Ltd [2007] eKLR**

38. He averred that the Leaned Trial Magistrate correctly assessed the general damages because it was evident from the Medical Report of Dr Jacinta Maina, which was produced calling the maker thereof that he had complained of immense pain in the right knee and that he could not walk or stand for long hours, which injuries the doctor termed as “serious”

39. It placed reliance on the following cases to support its argument that the general damages that were awarded were reasonable:-

1. Gabriel Mwashuma vs Mohammed Sajjad & Another [2015] eKLR

The plaintiff therein suffered injuries of a fractured right femur and was awarded Kshs 3,000,000/= general damages for pain and suffering in 2015.

2. Gideon Ndungu Nguribu vs Michael Njagi Karimi [2012]

The plaintiff therein suffered a fracture of the thigh bone and humerus. He was awarded Kshs 2,000,000/= for pain and suffering in 2012.

40. It is now a well settled principle that general damages that are awarded must be comparable to what has been awarded as was held in the case of **Nyambura Kigarigari vs Agrippina Mary Aya (**Supra) that was relied upon by the Respondents. This is for consistency and uniformity purposes. They must also be sustainable. Indeed, high awards of general damages push up insurance premiums. Courts should therefore bear this in mind when awarding inordinately high damages. Courts should also bear in mind that no amount of money can compensate an injured party.

41. Any compensation awarded to such party is merely to give him some comfort that the person who caused him injuries has not gone scot free but he has been punished by compensating him. Indeed, money cannot even bring an injured party close to the state that he was in before he sustained the injury.

42. It was against that background that this court found and held that the general damages that was awarded to the Respondent was manifestly excessive so as to have represented an erroneous estimate of the award.

43. In the cases relied upon by the Respondent, the claimants therein had sustained more severe injuries. In the case of **Gabriel Mwachuma**

vs Mohammed Sajjd & Another (Supra), the plaintiff therein had sustained fractures to the left thigh, left ankle joint, tibula shaft amongst other injuries.

44. In the case of **Gideon Ndungu Nguribu & Another vs Michael Njagi Karimi** (Supra), the respondent therein had sustained a displaced fracture of the right humerus, fractures of the radius and ulna, fractures of the tibia and fibula, deformity and swelling of the right forearm amongst other injuries.

45. Notably, the Medical Report by Dr Jacinta Maina did not indicate the extent of the permanent disability that the Respondent herein suffered. Notably, her Medical Report was written about a year after the accident herein. No other Medical Report was adduced in court to demonstrate the extent of the Respondent's disability as at 2013.

46. This court thus found the cases that were relied upon by the Appellants to have been more comparable to the injuries that the Respondent herein had sustained and this court associated thus itself with the same. Taking the inflationary trends, the injuries that the Respondent herein sustained and comparable awards for similar injuries, it was the considered view of this court that a sum of Kshs 800,000/= general damages would be adequate to compensate him for the injuries that he sustained.

47. In the circumstances foregoing, Grounds of Appeal Nos (3) (5) and (7) were merited and are hereby upheld.

B. FUTURE MEDICAL EXPENSES

48. Ground of Appeal No 4 was dealt with under this head.

49. The Appellants submitted that it was errorneous for the Learned Trial Magistrate to have awarded future medical expenses when the same were not pleaded in the Plaint: They relied on the case of **Zachary Kariithi vs Joshen Otieno eKLR** where it was held as follows:-

> **"..We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head".**

50. On his part, the Respondent relied on the case of **Peter Ngugi Kimani vs Joseph Kariuki [2018]) eKLR** which relied on the case of **Thomas K Ngaruiya & 2 Others vs David Chepsiror [2012] eKLR** where it was held that:-

"A claim for future medical treatment was part of general damages and thus did not need to be specifically pleaded"

51. Both the case of **Zachary Kariithi vs Jaston Otieno Ochola** (Supra) were decided by courts that were of equal and competent as this one of **Peter Ngugi Kimani vs Joseph Kariuki** (Supra) one of them therefore bound this court.

52. This court nonetheless associated itself with the holding of Majanja J in **Zachary Kariithi vs Jaston Otieno Ochola** (Supra) that future medical expenses had to be pleaded in the plaint to be awardable. As they were not pleaded by the Respondent herein in his Plaint, this court therefore took the view that the Learned Trial Magistrate erred in heaving awarded the same.

53. Indeed, parties are bound by their pleadings. In the case of **Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mule & others [2014] eKLR** that Court of Appeal cited with approval of the Supreme Court in Nigeria in the case of **Adetoon Oladeji (MIG) vs Nigeria Breweries PLC S.C. 91/02** it had been held that:-

> **"…It is now a very trite principle of 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 kin the pleadings goes to no issue and must be disregarded."**

54. The Respondent had about three (3) years between the time the Medical Report was prepared and the time the matter was heard and hence, he had ample time to have amended his Plaint to include his claim for Future Medical expenses that had been alluded to in the Medical Report of Dr Jacinta Maina. He did not do so and must therefore be bound by his pleadings.

55. In the premises foregoing, this court found merit in Ground of Appeal No 4 that the Learned Trial Magistrate erred both in law and fact in having awarded Future Medical expenses when the same had not been pleaded in the Respondent's Plaint.

SPECIAL DAMAGES

56. Ground of Appeal No (6) was dealt with under this head.

57. Although the Appellants had stated in their Memorandum of Appeal that the Learned Trial Magistrate erred in awarding the Respondent a sum of Ksh 97,000/= yet only a sum of Kshs 38, 329/= had been supported by receipts, they did not submit on this issue. This court did not therefore delve into the issue as it appeared as though they had abandoned that ground of appeal

DISPOSITION

58. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 8th August 2016 was partially successful. Its effect is that the decision of the Learned Trial Magistrate, Hon Peter Muholi (R M) that was delivered on 20th July 2015 is hereby set aside, varied and/or vacated. In its place, it is hereby directed that judgment be and is hereby entered in favour of the Respondent for Kshs. 897,000/= made up as follows:-

General damages Kshs 800,000/=

Special damages Kshs 97,000/=

Kshs 897,000/=

Plus costs and interest. Interest on special damages will be from the date of filing suit while interest on general damages will be from date of judgment of 20th July 2015 till payment in full.

59. As the Appellant was partially successful in their Appeal, each party will bear its own costs of this Appeal.

60. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of June 2019

J. KAMAU

JUDGE