REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEALS DIVISION

CIVIL APPEAL NO. 27 OF 2018

DAVID GITHUU KURIA..... APPELLANT

VERSUS

EQUITY BANK (KENYA) LIMITED..... 1ST RESPONDENT

MARGARET NYAMBURA NG'ANG'A .....2ND RESPONDENT

NICK ODHIAMBO.....3RD RESPONDENT

(Being an appeal from the whole Ruling of the learned Principal Magistrate M.O. Obiero delivered on 12th September, 2018 in PMCC No. 36 of 2017 in the Principal Magistrate's Court at Bondo).

JUDGMENT

1. This appeal arises from the Ruling and Order made on 12.9.2018 by Hon. M Obiero, P.M. in Bondo **PMCC No. 36 of 2017** determining the application dated 21.6.2018 filed by the plaintiff David Githuu Kuria seeking for Orders for review and/or variation of the judgment of the Court delivered on 14.6.2018 in respect of General damages.

2. In the said ruling, the trial Court declined to grant Orders sought for review of its judgment hence this appeal.

3. The appeal raises the following grounds of appeal:

> **1. The Learned Magistrate erred in law in dismissing the Notice of Motion dated 21.6.2018 in total disregard of the issues of Law and fact raised therein.**
>
> **2. The Learned Magistrate erred in Law and fact in ignoring the fact that there was sufficient reason and/or purpose to review the judgment delivered on 14.6.2018.**
>
> **3. The Learned Magistrate erred in Law and in fact as the ruling was against the weight of evidence adduced by the Plaintiff/Applicant which facts as the ruling was against the weight of evidence adduced by the Plaintiff/Applicant which facts were justifiable, substantive and overwhelming as provided for in the law.**
>
> **4. The Learned Magistrate erred in Law and fact by holding that the (sic) by misinterpreting the facts of the contents of the consent dated 9th April, 2018 which required the parties to attach the Medical Report on the submission.**
>
> **5. The Learned Magistrate erred in Law and in fact by totaling ignoring and not taking into consideration the submissions of the Appellant.**
>
> **6. The Learned Magistrate erred in Law in failing to take into consideration the High Court decisions cited by the Appellant which authorities are binding on the Lower Court.**

4. The Appellant prayed that this appeal be allowed, the ruling of the Lower Court delivered on 12.9.2018 be set aside, the Appellant be awarded general damages and costs of the appeal be awarded to the Appellant.

5. This being a first appeal, this Court is obliged, as stipulated in **Section 78 of the Civil Procedure Act** and as expounded in the case of **Sielle Vs. Associated Motor Boat Company Limited [1968] E.A.123** where the Court stated:

> **"… the duty of the first Appellate Court is to rehear the case by considering the evidence on record, evaluate it itself and draw its own conclusion, in deciding whether the judgment of the trial Court should be upheld, as well of course, deal with any question of Law raised on appeal."**

6. Re-examining the record of the trial Court, vide a plaint dated 22nd February, 2017, the plaintiff filed suit against the defendants seeking for general damages as well as special damages, arising from an alleged Road Traffic Accident which occurred on 8.4.2015 along Siaya-Ndori road involving the Plaintiff as passenger in Mr. Reg. No. G.K. A702G. Nissan Urvan and Motor vehicle Reg. No. 484X Toyota ISIS. The two motor vehicles allegedly collided thereby injuring the Plaintiff/Appellant herein.

7. However, in the said plaint, the Plaintiff did not tabulate or specify the injuries that he allegedly sustained following the said accident. The plaint simply stated; at particulars of injuries:

> **"As per the Medical Report by Dr. Kungu."**

8. He then pleaded special damages amounting to KShs.241,707,000 costs and interest.

9. The suit was heard and the plaintiff testified on 14.2.2018 on how he was involved in an accident, found himself in hospital and the injuries that he sustained.

10. The defendants closed their case without adducing any evidence on 11.4.2018. The plaintiff closed his case without calling any witness. On the said date, the Parties' Advocates intimated to Court that they had filed a consent, they therefore urged the Court to give them a date for submissions.

11. The Parties did not ask the Court to adopt the consent. The trial record shows that on 11.4.2018 a consent dated 9th April 2018 was filed and it states as follows:-

> **"We the undersigned Advocates for the Plaintiff and the Defendant respectively would like to record the following consent Orders:**
>
> **By Consent:**
>
> **a. The Medical Report by Dr. G.K. Mwaura dated 5th April, 2017 is adopted by the consent of the parties.**
>
> **b. The Medical Report and the receipt be attached as exhibits on submissions.**
>
> **c. The Parties to file written submissions**
>
> **Dated at Nairobi this 9th day of April, 2018.**
>
> **Signed,**
>
> **Fatuma Mungoni & Company**
>
> **Advocates for the plaintiff**
>
> **Signed,**
>
> **Omaya & Company**
>
> **Advocates for the Defendants."**

12. I reiterate that the Parties' Advocates despite filing a consent which they themselves adopted by signing, agreeing to have the Medical Report by Dr. G.K. Mwaura dated 5.4.2017 attached as exhibit on the submissions, they n**ever** asked the Court to adopt the said consent as the Order of the trial Court and neither did the trial Court adopt the said consent as its order.

13. The parties then filed written submissions but as it turned out albeit the Plaintiff's Counsel referred to the Medical Report of Doctor. G.K. Mwaura on the injuries sustained by the plaintiff, he never annexed the said Medical Report onto his submission dated 18.4.2018. The Parties had already, at the commencement of the hearing vide a "**consent**" dated 6.10.2017 agreed on apportionment of liability in the ratio of 70% against the defendant and 30% against the Plaintiff that consent, from the trial record, was adopted by the Court as the Order of the Court on 13.12.2017 in the presence of both Parties' Advocates Mr. Simiyu for the Plaintiff and Mr. Mungoni holding brief for Mr. Omaya for the Defendant.

14. The Defendant's Counsel filed written submissions dated 25th August, 2018 and in proposing quantum of damages, they referred to the Medical Report by Doctor. G.K. Mwaura dated 5.4.2017. They proposed quantum of damages to be KShs.95,000, general damages. The Plaintiff had proposed KShs.1,000,000 general damages.

15. In his judgment delivered on 14.6.2018 the trial Court found that as the Medical Report by Doctor. G.K. Mwaura which enumerated the injuries of the Plaintiff and which had merely been marked as MFI 8 was not produced as an exhibit and that as neither was it annexed to the submissions as per the consent dated 9.4.2018, the trial Court was unable to find the basis upon which to assess general damages since the injuries sustained by the Appellant/Plaintiff in the alleged accident were never pleaded in the plaint. He therefore did not award any general damages to the plaintiff.

16. It was the above judgment which prompted the Plaintiff/Appellant herein to promptly file a Notice of Motion dated 21.6.2018, under Article 48 of the Constitution, Section 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

17. The application sought for review/verifying of the judgment delivered on 14.6.2018 in respect of general damages. In the said application, the Applicant/Plaintiff's Counsel claimed that the Medical Report was attached to the submissions and that she was at a loss as to what led to it missing from record. Further, that in any event, there was a copy of the said Medical Report attached to the Plaintiff's further list of documents dated 12.4.2017 filed in Court on 13.4.2017.

18. Further, that as the defendants never contested the said Medical Report, the trial Court should adopt it as an exhibit, Counsel urged the Court not to visit his mistake to his client.

19. The defendants in opposing the Notice of Motion filed grounds of opposition and submissions contending that there was no Medical Report attached to the submissions or consent hence the Court was right in denying the plaintiff an award of general damages. The defendants also insisted that the plaintiff had not satisfied the requirements for review **under Order 45 of the Civil Procedure Rules** and that the Plaintiff's Counsel had failed to extract a formal Order or a decree which was sought to be reviewed. Counsel also argued that Counsel's mistakes were to be borne by his Advocate as proposed by **Hon. Warsame – J, in HCCA 182 – 190/2003 Gateway Bus Services Limited Vs. Hezron Agot Oduma**.

20. As earlier stated, the trial Court after considering the merits of the application dismissed it with costs to the defendants hence this appeal.

SUBMISSIONS

21. In support of the grounds of Appeal herein, both parties' Advocates agreed and with leave of the Court filed written submissions for and against the appeal. The Appellant's Counsel filed his submissions dated 8th March 2019 whereas the Respondent's Counsel filed theirs on 25.3.2019.

22. The Appellant's Counsel urged the Court to determine the following 3 issues:

a. Whether the Learned Magistrate misapprehended the grounds upon which an Order for review will issue.

23. Under this issue, it was submitted, reproducing Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and a submission made that there was other sufficient reason for review of the judgment by the trial Court as the nature of the injuries were never in issue but only quantum of damages which the trial Court should have drawn an inference through the submission, and award general damages for the sake of justice.

24. Further, that in any event, as Order 11 of the Civil Procedure Rules had been complied with, no prejudice would have been occasioned to the Respondent if the judgment was reviewed. Reliance was placed on **Martha Wambui v. Irene Wanjiru Mwangi & Another [2015] eKLR** where the Court held that it could still review the Order made on "***any Other sufficient reason,"*** which Order need not be analogous with the other grounds set out in the rule in Order 45 of the Civil Procedure Rules. Counsel argued that as the Respondents did not dispute the copy of Medical Report annexed to the Appellant's further list of documents since both parties were in agreement on the nature of the Plaintiff's injuries sustained, the Court should have determined what general damages were awardable to the Plaintiffs and in the interest of Justice.

b. Whether this Court has the discretion to review the decision of the Lower Court and award the Plaintiff General Damages.

25. It was submitted by Counsel for the Appellant that in the interest of justice, the trial Court should have reviewed the judgment as the Plaintiff's Counsel did not deliberately fail to attach the Medical Report as she was at a loss as to what may have transpired. Reliance was placed on **Tiras Karanja Ngatha v Silas Gachugu Ngugi and Another [2017] eKLR citing Benjoh Amalgamated Limited and Another Vs. KCB Limited, No. SUP 16 of 2012.** It was submitted that no prejudice would be occasioned to the Respondent if review of the judgment is done but that failure to review the judgment as sought would instead cause prejudice and gross injustice to the Appellant.

c. Whether the Learned Magistrate ignored and failed to take into consideration the High Court decisions cited by the Appellant

26. It was submitted that the Appellant relied on same decisions in **Nuh Nassir Abdi v Ali Wario and 2 Others [2013] eKLR** on the exercise of discretionary power of the Court to review an earlier Order.

27. Counsel maintained that the useful purpose to be served by the review was that of justice and argued that granting special damage while

denying general damages amounted to ***acknowledging that a child was born out of the mother never existed***.

28. The other decision which the trial Court was accused of ignoring is **Stephen Boro Gitiha Vs. Family Finance Building Society and 3 Others Court of Appeal Nairobi 263 of 2019** where the Court held, ***inter alia*** that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and that whatever is in conflict with it must give way.

29. According to the Appellant's Counsel, failure to annex the Medical Report to the submissions was an accidental slip or overrides which may have been corrected by the Court either on its own motion or on the application of any of the parties. Further reliance was placed on **Tiras Karanja Ngatha v Silas Gachugu Ngugi and Another [Supra] on the philosophy inherent in the concept of review.**

30. Finally, Counsel submitted that this Court should in the interest of justice allow the appeal, review the judgment of the trial Court and award general damages to the Appellant based on the injuries cited in the Parties' submissions and the Plaintiff's submission **further** list of documents in the Lower Court.

31. On the part of the Respondents it was submitted by their Counsel that there is no Order appealed from and that as none was filed with the Memorandum of Appeal, the Appeals is incurably defective as it offends Order 42 Rule 2 of the Civil Procedure Rule hence it is incompetent *ab initio*.

32. On the merits of the appeal, it was submitted that the Medical Report was non-existent and that the trial Court could not have gone outside the mandate of the Consent. That Parties having consented to filing of the original Medical Report, the Court could not have admitted a copy of the same which was in the further list of documents.

33. It was further submitted in contention that as there was no extracted decree or order as an annexture, the application for review was still incompetent and that **Article 159 of the Constitution** could not cure the defects/loopholes in the application.

34. It was submitted that as the Appellant did not even seek leave of Court to file a Medical Report out of time, reviewing the judgment would be futile as there was no Medical Report produced to be relied upon to assess general damages.

35. Counsel for the Respondent contended that submissions are not evidence and that copies of documents filed in Court cannot be evidence as evidence must be adduced in the manner stipulated in Law. Counsel maintained that the oxygen principle did not come to do away with the Law.

36. On **ground 1** it was submitted that no issues of law or fact allegedly disregarded by the trial Court have been enumerated.

37. On **ground two** the Respondent contended in submission that no sufficient reasons were given for review of the judgment.

38. On ground 3, it was submitted that the Court's hands were tied to the consent on how the Medical Report was to be produced by annexing it to the written submissions.

39. It was submitted that, that consent is not open to interpretation by the Court hence there was no misinterpretation by the trial Court as the consent was plain on the real intention of the parties.

40. On ground 5, the Respondent's Counsel maintained that the trial Court considered submissions hence the attack by the Appellant of the trial Magistrate is unfair. On the authorities cited in the Lower Court, it was submitted that the trial Court considered them and distinguished them at **Paragraph 10 Pg. 221 of the Record of Appeal.**

41. It was submitted that as the Orders sought were discretionary, this Court is not bound by precedents of Courts of concurrent Jurisdiction unless they are relevant decisions but that the ones cited are irrelevant to the issues raised herein and are only persuasive not binding.

42. Counsel urged this Court to dismiss the appeal with costs.

DETERMINATION

43. I have carefully considered the appeal herein, the trial Court record and submission by both the Appellant and Respondent's Counsel on record. The main issue that arises for determination is w***hether the trial Court erred in Law and fact in rejecting the application for review of the judgment to allow the Medical Report by Dr. G.K.Mwaura who had examined the Appellant.***

44. There are other ancilliary questions which I will endeavour to answer. To resolve this substantive issue, it is first and foremost, important to consider the Law regarding review of judgments or Orders. The same can be found at Section 80 of the Civil Procedure Act as implemented by Order 45 of the Civil Procedure Rules. Under Order 45(1) of the Civil Procedure Rules, the requirements for an application for review are:

> **"Any person considering himself aggrieved:**
>
> > **(a) by a decree or Order from which an appeal is allowed, but from which an appeal is allowed, but from which no appeal has been preferred, or**

(b) By a decree or Order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the Order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or Order, may apply for review of judgment to the Court which passed the decree or made the Order without unreasonable delay."

45. In **Stephen Githua Kimani Vs Nancy Wanjira Waruingi T/A Providence Auctioneers [2016]e KLR t**he Court of Appeal stated:

"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the applications for case afresh. In other words, I find no material before we demonstrate that the Applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

46. From the application filed by the Appellant in the Lower Court, it is clear that he was not referring to any new and important matter as a ground upon which the application for review of judgment delivered on 14.6.2010 was being lodged. Mainly, the Applicant was claiming that he had filed a Medical Report dated 5th April 2017 with a list of his further list of documents which included the said Medical Report hence even if the said Medical Report was not annexed to the written submissions as per the consent recorded in Court, the trial Court should have used the copy of the Medical Report on record and assessed general damages for the injuries sustained by the Appellant as per the said Medical Report.

47. I have examined the trial Court record. PW1 David Githuu Kuria testified on 14.2.2018 and stated how he was involved in a Road Traffic Accident on 8.4.2015 and how he was injured and escorted to hospital at Aga Khan in Kisumu and Nairobi at Crescent Hospital. He produced a sick sheet from Aga Khan Hospital, Kisumu as Exhibit 1 and Crescent Hospital as Exhibit 29 – d and Catholic Hospital as Exhibit 3(a) and (b) together with X-ray form dated 1.7.2015 as Exhibit 4, together with a discharge summary from Aga Khan Hospital as Exhibit 5.

48. He then produced P.3 form as Exhibit 6 and Police Abstract as Exhibit 7. When it came to the Medical Report, he stated that he was examined by Dr. G.K. Mwaura who prepared a Report. The Medical Report by Dr. G.K. Mwaura was marked for Identification as M.F.I. 8. It was not produced as an exhibit.

49. After the Plaintiff had testified and cross-examined by Miss Nyangoro Advocate for the Respondents herein and re-examined by his Advocate Mr. Mogire, Mr. Mogire sought an adjournment to enable him call the doctor and the case was adjourned for further hearing on 11.4.2018. On the latter date, Ms. Wanyonyi holding brief for Mungoni Advocate for the Plaintiff informed the Court as follows:-

"Ms. Wanyonyi: This matter is for hearing. We remained with one witness. However, we have filed a consent adopting the report. It is *dated 9.4.2018. We do request for a date for filing submissions."*

50. Miss Nyangoro holding brief for Omaya for the defendants stated:

That is the position. We do close the defence case"

51. The trial Court then recorded as follows:

"Court: Plaintiff's case closed. Defence case closed. Mention on 3.5.2018 for submissions."

52. On 3.5.2018, the trial Court gave a date for judgment on 7.6.2016. The Defendant's Counsel was absent. The Plaintiff's Counsel Ms. Odongo holding brief for Mungoni was present and stated that they had filed submissions for the Plaintiff.

53. This Court from the above record of proceedings observes that first and foremost, the Plaintiff never produced a Medical Report by Dr. G.K. Mwaura, which Medical Report was marked for identification as MFI 8.

54. Secondly, albeit on 11.4.2018 the respective Parties' Advocate claimed that they had filed a consent adopting the report, the report was never annexed to the consent. In addition, the trisl Court was never asked to adopt the consent as an order of the Court.

55. Thirdly, is that the Plaintiff's Advocates never annexed the said Medical Report to the written submissions filed as per their consent signifying their client's intentions to have the Medical Report produced in Court by consent.

56. The application for review of the judgment never annexed a copy of the said Medical Report and neither did the Applicant seek out the Court to have the said Medical Report produced. Instead, Counsel argued that the trial Court should have relied on the further list of documents filed by his Advocate as he did not understand how the Medical Report went missing because he believed that it was annexed to the submissions. There was no allegation that the Medical Report got lost. In the view of this Court, the Appellant was blowing both cold and hot.

57. There was absolutely no Order of the Court adopting the consent filed seeking to produce the Medical Report by Dr. G.K. Mwaura through written submissions. Accordingly, I find no error apparent on the face of the record.

58. For avoidance of doubt, a consent signed and filed by Parties to a suit or dispute must be adopted by the Court as an Order of the Court otherwise it remains merely a document filed on record.

59. However, as the consent was signifying the intention of the parties but due to inadvertence on the part of the trial Court it never adopted the same, this Court has power to correct the error and proceed to adopt the consent which I hereby do and adopt it as an Order of the Court.

60. Having so adopted the consent filed by the Parties dated 9.4.2018, the next question is whether the said Medical Report and Receipt to be attached as exhibits on Submissions was ever attached as agreed.

61. What emerged during the hearing of the application for review is that the Plaintiff's Counsel did not understand how the Medical Report was missing from the written submissions and that even the Defendant's Counsel referred to it in their submissions dated 25.8.2018 and even proceeded to quantify the Plaintiff's general damages based on the said Medical Report by G.K. Mwaura, dated 5.4.2017. I quite agree with the Plaintiff's /appellant's Counsel's submission on this. The Defendant's Counsel did address the trial Court on quantum of damages after the aprties had agreed on liability to be shared between the appellant and respondent at 30% to 70% and in so doing used the Medical Report by Dr. G.K. Mwaura on the injuries allegedly sustained by the Plaintiff and proposed a sum of KShs.95,000/= general damages and KShs.241,707 special damages.

62. The Plaintiff's Counsel, nonetheless proposed a sum of KShs.1,000,000 based on the same Medical Report and stated that the Medical Report was to be annexed as exhibit in the submissions.

63. However, only the authority of **Catherine Wanjiru Kingori and 3 Others Vs. Gibson Theuri Gichubi [2005] eKLR** was annexed and there is nothing on record to show that the Medical Report could have been removed or plucked out from the submissions.

64. That being the case, I am of the view that as the intentions by the Parties was clear that they intended to rely on the Medical Report by Dr. G.K. Mwaura for purposes of assessment of general damages which they went ahead to quantify as if they were indeed in possession of the Medical Report in question, the trial Court should not have merely dismissed the claim for general damages. He should have at the time of Judgment writing inquired from the Parties on the whereabouts of the Medical Report, which report was mentioned in the Plaintiff's and defendant's written submission. Nothing prevented the trial court, in the interest of justice, from recalling the parties and asking them to supply the Court with the said exhibit so as for justice to be seen to be done.

65. No doubt, I see no deliberate intention of the appellant's counsel to withhold from court the medical report which was going to assist his client get justice, and which medical report, from the court record, was shared with the respondent's counsel and even filed as one of the documents intended to be relied upon by the appellant at the hearing as stipulated in Order 11 of the Civil Procedure Rules. In my view, omission of the medical report in the written submissions was an honest mistake of omission.

66. The Court of Appeal in **Belinda Murai & Others vs Amoi Wainaina (1978) KLR 2782,** Madan J.A (as he then was) described what he considered constitutes a mistake in the following words:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary o rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which court of appeal sometimes overrule."**

67. Further, in **Phillip Chemwolo & another vs Augustine Kubende (1982-1988) KAR 103 at 1040** Apaloo J. A. (as he then was) postulated as follows:

> **" Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that because a mistake has been made that a party should suffer the penalty of not having his case heard as merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

68. Article 159 of the Constitution and Sections 1, 1A, 3 and 3A of the Civil Procedure Act on the oxygen principle abhor procedural technicalities, which would in effect defeat justice.

69. In addition, with or without a Medical Report, the Appellant had produced as exhibits, Medical treatment notes from various hospitals and discharge summaries from hospitals where he was treated and in addition, he had produced a P3 form which is also a Medical Report as exhibit 6 which details the type and nature of injuries sustained by the Appellant, as assessed to be harm, as signed on 24.6.2015 by Dr. Robert Orina.

70. In view of the above it follows that the trial Magistrate was not deprived of the material upon which he could have assesed general damages in favour of or even against the Appellant/Plaintiff and to that extent, I find and hold that the trial Court erred in totally ignoring the Medical documents on record and in proceeding to decline to assess general damages.

71. However, this being a first Appellate Court, I must as espoused in the **Sielle Vs. Associated Motor Boat Co. Limited (Supra) Case**, re-examine and re-assess the evidence adduced before the trial Court and arrive at my own independent conclusion and decision.

72. Thus, despite my above findings the question that begs answers is whether the Appellant was legally entitled to an award of general damages for pain, suffering and loss of amenities and if so, how much and if not what are the reasons for depriving him of such damages?

73. I have examined the pleadings filed by the Plaintiff/Appellant vide his plaint dated 22.2.2017 and filed in Court on 23.2.2017. I have not seen any amended plaint whether in writing or by an Order of the Court.

74. In the said plaint, the plaintiff at paragraph 9 of the plaint stated:

> **"9. As a result of the foregoing the plaintiff was put to loss and suffering for which he holds the defendants liable.**
>
> **PARTICULARS OF INJURIES**
>
> **a. As per the Medical Report by Dr. Kungu."**

75. The Plaintiff then proceeded to enumerate particulars of special damages and in the final prayers, he sought for:

> **a. Special damages: KShs.241,707.00**
>
> **b. General damages**
>
> **c. Costs and Interest on (a) and (b)**

76. There is no pleading of what specific injuries the plaintiff/appellant had sustained in the alleged accident. A pleading is defined in Black's Law Dictionary, 8th Edition as:

> **"A formal document in which a Party to a legal proceeding especially a Civil Law Suit sets forth or responds to allegation, claims, denials or defences."**

77. A pleading is not Evidence and neither can evidence amount to a pleading. Section 3 of the Evidence Act Cap 80 Laws of Kenya defines Evidence as:

> **"Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved, and without prejudice to the foregoing generally includes statements by Accused persons, admission and observation by the Court in its Judicial Capacity."**

78. In **CMC Aviation Ltd Vs. Cruise Air Ltd (1) [1978] KLR 103, Madan – J.** stated:

> **"Pleadings contain averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the Parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence"**

79. The Law is clear that Parties are bound by their pleadings. In claims of tortuous liability based on negligence, injuries and special damages must be pleaded. They cannot be imagined or inferred or simply be proved by production of Medical Reports or receipts.

80. The Court's road map is the pleadings on record, such that if a party pleads that they have suffered an injury, they must specify or particularize the said injury so that the adverse party can respond to the same in a specific way. It is important that the type of injuries and their extent as sustained are pleaded. **Charlesworth and Percy on Negligence at P.30**, States:

> **" ….. Once the existence of a duty of care has been established, which has been followed by a breach of that duty, the final elements to be proved of these essential components of actionable negligence has that *the consequential damage has been suffered*."**

81. In other words, to bring an inquiry as to the consequential damage, the claimant must plead the nature and existent of the injuries or damages suffered. It cannot be left in a vacuum or for the Court to pluck from the air. A claim of loss and damage must be underpinned on the pleading. So, on the question of injuries, damages resulting from one and the same cause of action must be assessed and recovered once and for all. As a result, the Court must be informed of the particulars by the loss and damage at the initiation of the claim.

82. The issue of alleged injuries sustained by the Plaintiff/Appellant was critical to the success of the appellant's claim. Furthermore, the plaintiff's Medical reports including P3 and discharge summary from various hospitals were available to him as the time of filing of the suit in the trial Court. And if for any reason they were not available, the Plaintiff/Appellant could have sought for amendment of pleadings at any stage of the suit.

83. In **Dare v Pulham (1982) 148, C.L.R. 658, the High Court of Australia** persuasively set out functions of pleadings as follows:-

> **"Pleadings and particulars have a number of functions, they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into Court ……"**

84. However, in CA. 57/2006 Trendsetters Tyres Ltd V. John Wekesa Wepukhulu [2010] e KLR the court stated that the relief must be founded on the pleadings ***except in very exceptional cases where Parties ignore the pleadings and proceed on issues mutually selected at the trial***.

85. Order 2 Rule 10 of the Civil Procedure Rules is clear that every pleading shall contain necessary particulars of any claim, defence or other matter pleaded. I addition, sub rule 2 empowers the court to serve on the other party particulars of any claim, defence or matter stated in the pleadings or statement of the nature of the case on which he relies and the order may be made on such terms as the court thinks just. In **Tracom Ltd & Another V. Hassan Mohamed Adan [2009] eKLR (C.A.)** it was stated:

> **"The purpose of requiring certain claims to be pleaded is to forewarn the defendant."**

86. In **HCC 319 of 2013 John Kibicho Thurima V. Emmanuel Parsimei Mkoitiko,** the Court observed that a Party's assertions cannot be availed through submissions. They must be pleaded and proved by adduction of evidence on Oath and be cross-examined on the same. See also **Malawi Railways Ltd v Nyasulu [1998] M. W. S.C., 3 cited. In I.E.B.C. & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR cited in the John Kibicho Thurima v Emmanuel Parsirmei Mkoitiko (Supra); Adetoum Olady, (NIC) Ltd v Nigeria Breweries P.L.C. S.C. 91/2002. See also Simon Muchemi Atako & Another v Gordon Osore [2013] e KLR C.A. See Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Another [2014] eKLR. Odunga – J.**

87. Despite all the above authorities and observations, this Court observes that despite the defendants raising at Para. 7 of their defence an objection to the manner in which the plaint was framed in terms of injuries sustained, and threatening to have that Paragraph struck out for being null and void, no such application was made to strike out that paragraph.

88. Instead, the Defendant's Counsel consented to the sharing or apportionment of liability between the plaintiff and defendant and the admission of the Medical Report that gave injuries allegedly sustained by the appellant following the accident where liability had already been agreed and shared at 30:70. It was not alleged by the defendants'/ respondents that the injuries allegedly sustained by the appellant were different from those given by Dr. G.K. Mwaura. The defendants in my view could not have agreed to sharing of liability in a matter where general damages were sought on account of non-existent injuries and neither could they have consented to admission of a medical report which had no effect to the proceedings or outcome of the case they were defending.

89. Further, Order 2 Rule 3 of the Civil Procedure Rules provide:

> **"3(1) Subject to the provisions of the Rule and Rules 6, 7 and 8 every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim and defence, <u>but not the evidence by which those facts are to be proved and the statement shall be as brief as the nature of the case admits."</u> Emphasis added.**

90. The plaintiff pleaded the fact that he was injured and evidence was in the form of a medical report which was admitted by consent of the parties to the suit. In other words, this court does not believe that the defendants were duped into the consents and neither was there any evidence that they were not made aware of the injuries sustained by the plaintiff hence they did not know what they were defending in the first place. I say so because the defendants quantified the plaintiff's general damages on the basis of the medical report by Dr G.K Mwaura hence they were not deceived of what to expect in a judgment for general damages.

91. The Defendants' Counsel clearly outlined the same injuries in their submissions wherein they quantified damages for the injuries sustained by the appellant at Kshs 95,000/.

92. Thus, by their very own conduct right from consenting to admission of the Medical Report by consent, to submitting on the injuries sustained by the appellant and wholly relying on the Medical Report by Dr G .K. Mwaura and quantifying damages, the defendants made the plaintiff believe and indeed the plaintiff acted on that belief and never sought to amend the plaint to plead specific injuries.

93. Further, as the defendants relied on the same Medical Report, in my view, the Parties' submissions on the injuries sustained by the plaintiff did amend the plaint and filled the void of the non-pleaded injuries.

94. Accordingly, the defendant is estopped from seeking to bar the Plaintiff from relying on the Medical Report which Report was pleaded by the plaintiff.

95. Furthermore, the Court is enjoined by Section 100 of the CPA to amend at any time, and on such terms as to costs or otherwise as it may think fit, any defect or error in any proceeding in a suit, and all such necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

96. In my humble view, pleadings are intended to notify the adverse Party of the case that they expect to meet at the trial to enable them prepare for a response thereto and/or to defend.

97. In this case, the appellant's advocate pleaded injuries as per the medical report which he shared with the Respondents' advocates and both parties agreed that the medical report be produced in evidence by consent through written submissions. What is expected of all advocates is professionalism and competence in the arena of Prosecution of claims. However, where the adverse Party from their conduct acquiesces to the default by the Plaintiff and plays an active role in endorsing on a consent that allowed the Medical Report to be produced by consent, which Medical Report enumerated injuries sustained by the Plaintiff and no other documents or Medical Report is produced by the Respondents to controvert these injuries, the view of this Court is that the defendant is estopped from denying that they had notice of the injuries sustained by the Plaintiff, in a case where liability had already been agreed upon.

98. In my humble view, therefore the trial Court should have inquired on the whereabouts of the Medical Report admitted in evidence by consent before writing the judgment, and therefore the application for review was in my view, merited as there was sufficient reason to warrant a review.

99. I must however mention that failure to extract the order appealed from or decree is not fatal to this appeal. It is a procedural technicality curable by application of Article 159 of the Constitution. The ruling subject of this appeal is contained in the record of appeal and so is the judgment which was sought to be reviewed by the trial court which in my view are sufficient material for this court's consideration on merits not extracts of decisions.

100. For the above reasons, the appeal herein succeeds. The application for review of the judgment of the trial court declining to asses general damages for the plaintiff is hereby allowed, the order dismissing the application for review is made on ***12th September, 2018 is*** hereby set aside and substituted with an order allowing the application for review of the judgment. The Medical Report by Dr. G.K. Mwaura is hereby admitted. The Appellant is granted leave of Court to file the said Original Medical Report by Dr. G.K. Mwaura within 15 days of this judgment.

101. The matter is remitted back to the trial Court for re-consideration and assessment of damages taking into account the Medical Report of Dr. G.K. Mwaura.

102. On costs, I observe that the mistakes leading to the Orders of the trial Court were made by the Plaintiff's Counsel and not the Defendants as the Defendants had conceded to production of the Medical Report by consent.

103. That being the case, despite the successful appeal, I decline to award the Appellant costs of this appeal and Order that each party shall bear their own costs of the Appeal.

104. The Plaintiff shall however, bear costs of the application for review of the Judgment, to be agreed upon or be assessed in favour of the Respondents.

105. Orders accordingly.

Dated, signed and delivered at Siaya this 24th Day of September, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Oduol h/b for Ms Mungoni for the appellant

Clerk from the Respondents' counsel present

CA: Brenda