REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 38 OF 2017

VALJI JETHA KERAI.....1st APPELLANT

MWNCHITI NYALE.....2nd APPELLANT

VERSUS

JULIUS OMBASA MANONO.....1ST RESPONDENT

YUSUF FATMAH.....2ND RESPONDENT

J U D G M E N T

1. This is an appeal by the defendant in the lower court against the quantum of damages awarded by the court. The 2nd respondent as 3rd defendant at trial did not enter appearance or file a defense and a default judgment was entered for the respondents against him, by consent judgment on liability was entered and apportioned at 80%:20% in favour of the 1st Respondent as the plaintiff at trial. The respondent's claim in the lower court was based on negligence. The Respondent had suffered injury to his person out a traffic accident while lawfully travelling in motor vehicle Registration No. KBG 677A.

2. The trial court having entered judgment on liability on the said agreed terms and proceeded to assess damages, upon receiving the parties' respective submissions on quantum. The final judgment of the court was summarized as bellow;-

a) General damages Kshs. 2,500,000/=

Less 20%- Kshs. 719,000/=

b) Special damages Kshs. 798,900/=

c) Costs of future medical expense Kshs. 300,000/=

d) Plus costs and interest.

3. It is the above judgment that is the subject of this appeal, more specifically, in respect to the award for damages for pains and suffering as well as future medical expenses.

4. The appellants have listed 12(twelve) grounds of Appeal in their Memorandum of Appeal dated and filed on the 24th February 2017 contained in the Record of Appeal at page **2-4.**

5. When the appeal came up for directions before this Court 12th February 2019, parties agreed to canvass their arguments on appeal by way of written submissions. After considering the Memorandum of Appeal and the written submissions lodged herein, this Court is persuaded that there is only one issue for determination:

Whether the trial court acted on wrong principles of law in making the award of damages and came to an award that was inordinately too high?

Analysis and Determination

6. This is a first appeal and the court proceeding by way of a rehearing has the duty to re-evaluate and re-appraise the entire evidence afresh and make its own conclusion. The parameters upon which this court can interfere with the finding of the trial court are well established. In the case of **Butt V Khan** (**1981) KLR, 349** the court held as follows:-

> "***The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates."***

7. Similarly, in the case of **Shabani V City Council of Nairobi (1985) KLR, 516**. The Court of Appeal equally held as follows:-

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence**."

General damages for pains and suffering

8. At paragraph 9 of the re-amended Plaint *re-amended on the 17th October 2013*, the Respondent pleaded particulars of his injuries. Those injuries are confirmed in a medical report by **Dr. S.K Ndegwa** dated 3rd August 2010(Plaintiff exhibit 8 Page 52 - 53 Record of Appeal). When he took to the stand, the plaintiff established the injuries and his medical report was produced as Plaintiff exhibit 8.

9. The Appellants on their part relied on a medical report dated 9th November 2011 by **Dr.Udayan Sheth** who was instructed by their advocate on record. The said medical report was by consent of the parties admitted in evidence and marked D exhibit 1.

10. In arguing the appeal, **Mr. Nanji** counsel for the Appellants submitted that **Dr. S.K Ndegwa** in his medical report dated 3rd August 2010 did not show any permanent disability and it is stated in the said medical report he recommended to see the Plaintiff after 6 months to ascertain permanent disability which he did not. Therefore, the figure the doctor came up with in his testimony during trial of 12% permanent disability which was subsequently relied on by the trial magistrate was completely unfounded.

11. **Mr. Nanji** also submitted that **Dr.Udayan Sheth being a** consultant orthopedic surgeon**,** his opinion would carry more weight than that of **Dr. Ndegwa** whose specialization was not in the area of bones and for those reason the trial magistrate ought to have been guided by the medical report by **Dr**. **Udayan Sheth** in arriving at his decision on general damages and future medical expenses.

12. **Mr. Nanji** further submitted that the suffered injuries proved by the Plaintiff in his testimony during trial were not in consonance with injuries alleged to have been sustained by the Plaintiff in **Dr. Ndegwa's** medical report dated 3rd August 2010. He further submitted that **Dr. Udayan's** medical report contained genuine similar injuries to what the Plaintiff had proved during trial and therefore, the trial Court misdirected itself by relying on a medical report by **Dr. Ndegwa** that contain injuries that had been plucked from elsewhere.

13. I have had the opportunity to go back to the proceedings of the trial Court and noted that **Dr. Udayan Sheth** was not called as a witness during trial and that his medical report dated the 9th November 2011 was adopted as evidence and produce as D. exhibit 1, while **Dr. Ndegwa** was indeed called as PW2, and he was cross-examined by **Miss. Maithya** thereby putting his evidence to test. This Court notes that during cross-examination, the issue of injuries that were plucked from elsewhere did not arise and on permanent disability **Dr. Ndegwa's** admitted that he did not re-examine the Plaintiff but stated that he was aware of the assessment by **Dr. Udayan** though he did not agree with the assessment of 2% permanent disability.

14. From the foregoing, it is the finding of this Court that the Medical report by **Dr. Ndegwa** carries more weight because the same was subjected to cross-examination. Additionally, this Court finds that the issues of varying injuries in the two medical reports and the variance between the Plaintiff evidence and that in the medical report by **Dr. Ndegwa** did not come up during trial and the Appellant cannot have a second bite at the cherry when it failed to call its doctor as a witness to displace the inference made in the medical report by **Dr. Ndegwa.**

15. it is the Court's finding that by failing to call **Dr. Udayan** as a witness for purposes of having his evidence tested upon cross examination, the Appellant did not satisfy the elementary principle of law in civil litigation that he who alleges must prove the allegations on a balance of probabilities.

16. The question then emerges as to what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

17. On the conflicting medical reports, Odunga J **in the case of Martin Kidake v Wilson Simiyu Siambi [2014] eKLR** held:-

> **"In this case although certain medical reports were produced by consent of the counsel for the parties, the only medical expert who was called to testify in this case was PW1. It is clear that the medical reports produced in this case were not similar and in fact in certain cases there were irreconcilable discrepancies such as with respect to the assessment of the degree of injury. In those circumstances it is my view that there would be no basis for the Court to ignore the evidence of a witness who was called to give evidence and was cross-examined on his evidence."**

18. On the weight to be attached to such evidence of a doctor who was not called as a witness, Warsame, J (as he then was) in **Theodore Otieno Kambogo vs. Norwegian People's Aid Nairobi (Milimani) HCCC NO. 774 of 2000** held:

> **"The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same."**

19. The Court of Appeal in the decision of **Mohamed Musa & Another vs. Peter M Mailanyi & Another Civil Appeal No. 243 of 1998** expressed itself as follows:

> **"Under section 35(b) of the Evidence Act the medical report ought to have been produced by the maker thereof. The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendant as well as to the plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court make calculations or to reach a conclusion thereon otherwise the award cannot stand.....**
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> **In this case the finding of the trial court cannot stand as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases *ex parte,* the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party."**

20. I do find this decision to be more persuasive than that in **Simon M Kavii vs Simon Kigutu,** cited by the appellant, and I chose to follow it by finding that it was the evidence of Dr Ndegwa which was tested by cross-examination that ought to carry more weight.

On future medical expenses

21. On the claim for future medical expenses, whether awardable or not, the law was settled by the Court of Appeal in the case of **Tracom Limited and another** v **Hasssan Mohamed Adan [2009] eKLR** in the following words:-

> **"We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-**
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> **"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."**
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> **We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."**

22. in this matter, the Plaintiff in its re-amended Plaint pleaded future medical expenses of Kshs. 300,000/=and on cross-examination, **Dr. Ndegwa** stated that the 1st Respondent had been treated at Agha Khan Hospital and that his enquiry on how much it would cost to remove the metal plate *in situ* was a sum of Kshs. 300,000/=.When confronted with **Dr. Udayan's** finding on the issue of future medical expenses, during cross-examination, **Dr. Ndegwa** stated that surgery to remove metal implant in the Plaintiff body would not cost **Kshs. 85, 000/=** even in a public hospital because that figure was too low. From the foregoing, this Court finds no basis of interfering with the award of future medical expense awarded by the trial magistrate.

On special damages

23**. Mr. Nanji** Submissions on the hospital bills was to the effect that it was the 1st Respondent's employer who paid for his medical expenses save for the **Kshs. 20,000/=** only which was admittedly paid by the 1st Respondent. Counsel thus submitted that in those circumstances it would be unjust enrichment to award the said sum to the 1st Respondent Counsel relied on the case **Milicent Rachunyo vs Katola Richard HCCC No.38 of 2012** where the Court declined to award special damages to the Plaintiff.

24. This Court has had a look at the said receipts and finds that the receipt from Agha Khan Hospital are titled cash settlement and they were issued in the 1st Respondent's name and nowhere on the said receipts it is indicated that his employer paid the money on his behalf. In any event the 1st respondent did indicate that it was his entitlement. I hold that there being no dispute as to the payment being made it is not for the appellant to dig out where the money came from. It is enough that it was paid to the account and in the name of the 1st respondent. The only person who can raise the question of unjust enrichment is the employer and not the Appellant.

25. It is trite law that special damages have to be specifically pleased and strictly proved. A perusal of the record of appeal shows that the

special damages were pleaded in the re-amended plaint and proven by way of exhibits and testimony from the doctor. This Court find that the award for special damages was not erroneous and that the trial magistrate in arriving at a figure of 798,900/= subtracted the amount the Plaintiff admitted was from his employer.

Whether the general damages were inordinately high

26. This being the first appellate court, this Court will proceed to make my own conclusion as to the quantum of damages. In doing so it must be kept in mind that the task of assessment of damages is in the realm of the discretion of the court and that assessment of damages for personal injuries is a difficult task. It must also be born in mind additionally that damages are intended to compensate and never to enrich.

27. The 1st respondent, as plaintiff, relied upon and cited to court several decisions including **Bayusuf Freighters Limited v Patrick Mbatha Kyengo [2014] eKLR** where the sum of Kshs. 1,600,000/= was awarded **Caroline Wanjiku Karimi Vs Simon K Tum & Another [2012] Eklr** where the court awarded the sum of KShs. 1,800,000/= and **A M (Minor Suing through His Next Friend M a M) v Mohamud Kahiye [2014] eKLR** where Kshs. 800,000/= was awarded.

28. The Appellants as defendants at trial relied on **Nairobi HCCC. No. 469 of 1997 - Limo Rashid -Vs- The Hon. Attorney General** where kshs. 300,000/= was awarded in the year 2000 for multiple injuries involving head injuries concussions, fractures of the left collar bone ,fracture of the rib and cut wounds on various parts of the body. Reliance was also put on ***Mwavita Jonathan v Silivia Onunga [2017] eKLR*** where Majanja J awarded Ksh. 400,000/= for a blunt chest injury, fracture of the left hip, dislocated right knee joint, sprains at the neck and back and a deep wound on the left lower leg. **Kimatu Mbuvi T/A Kimatu & Bros v Augustine Munyao Kioko CIVIL Appeal No. 203 of 2001 [2001] 1 EA 139,** where general in the sum of kshs. 300,000/= was awarded in the year 2006.

29. I have had the chance to read all the decisions cited to the trial court and those cited to me and I will apply the principle of assessment of damages that comparable injuries ought to attract comparable damages[1] being aware that award of general damages is an exercise of judicial discretion for which the appellate court ought not to freely and lightly interfere with.

30. Given the foregoing, and guided by the comparative injuries in in decisions cited, while exercising my mandate as a first appellate court, I have come to the conclusion and opinion that the award for general damages in the sum of Kshs 2,500,000 was on the higher side. Doing the best I can, and without substituting my discretion for that of the trial court,I do reassess the damages under this head in the sum of Kshs 2,000,000/= which I consider commensurate to the 1st Respondents injuries.

31. In the upshot, I do allow the appeal herein to the extent that the general damages for pains and suffering awarded in the sum of Kshs 2,500,000.00 is reduced to Kshs. 2,000,000/=

32. On costs, I consider the appeal to have succeeded only to a very limited extent and I consider it just that each party shall bear their own costs of the Appeal.

Dated and delivered at Mombasa this 31st day of October 2019.

P.J.O. OTIENO

JUDGE

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[1] **Simon Taveta – Vs – Mercy Mutitu Njeri [2014] eKLR.**