REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 70 OF 2010

MATAYO MUSUNGU NGATO …….....…..…… 1ST APELLANT

FIMS LIMITED …….. 2ND APPELLANT

VERSUS

SAMSON KIAMA MACHARIA …….....…… RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable C. G. MBOGO in Eldoret Civil Case No.656 of 2006, dated 7th April, 2010)

JUDGMENT

1. In his amended plaint filed on 20th June 2001, the respondent, then the plaintiff sued the appellants, then the defendants, seeking both special and general damages for injuries sustained and expenses incurred as a result of a road traffic accident involving the 2nd appellants motor vehicle and the respondent's motor vehicle.

2. It was the respondents case that on or around 9th August 1998, he was lawfully driving his motor vehicle registration number KAJ 052 Y when the 1st appellant negligently drove a Mitsubishi Lorry registration number KAE 568 Z owned by the 2nd appellant causing it to violently crash his motor vehicle at the Kapsabet junction along the Eldoret – Nakuru road as a result of which he suffered severe personal injuries. His motor vehicle was also damaged beyond repair.

3. In their joint statement of defence as amended on 17th December 2003, both appellants denied all the allegations made in the respondents amended plaint and averred that if the accident occurred as alleged, it was caused or substantially contributed to by the respondent's negligence.

4. By consent of the parties, judgment on liability was entered in favour of the respondent against the appellants in the ratio of 80:20%. Hearing proceeded only for assessment of both general and special damages.

5. In his decision rendered on 7th April 2010, the learned trial magistrate *Hon. C.G Mbogo* (Chief magistrate as he then was) awarded the respondent general and special damages in the total sum of Kshs. 2,155,564 after taking into account the respondents 20% contribution.

The award was itemized as follows;

Damages for loss – 524,755.00

Motor vehicle - 519,699.00

Special damages – 2,694,454.00

Less20% - 538,890

Total - 2,155,564.00

6. The appellants were aggrieved by the above award. They proffered the instant appeal to this court through a memorandum of appeal filed on 4th July 2013 in which they relied on the following grounds;

(i) The learned Honourable Chief Magistrate erred in law and in fact in awarding an award in general damages that was manifestly excessive as to amount to an erroneous estimate of general damages.

(ii) The learned Honourable Chief Magistrate erred in law and in fact in granting an award in material damage to the Respondent's motor vehicle contrary to the evidence tendered.

(iii) The learned Honourable Chief Magistrate erred in law and in fact in allowing an award of special damages which was not supported by evidence tendered.

(iv) The learned Honourable Chief Magistrate erred in law and in fact in allowing a claim for subrogation which was not pleaded for and or proved.

(v) The learned Honourable Chief Magistrate misdirected himself in arriving at a wrong decision in awarding damages which were against the weight of the evidence adduced.

(vi) The learned trial magistrate erred in law and in failing to take into account the pleadings, evidence and submissions tendered by the defence in awarding damages herein.

7. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 23rd November, 2015 while those of the respondent were filed on 12th April, 2016.

The submissions were highlighted before me on 25th October, 2010 by learned counsel *Mr. Akenga* for the appellants and *Ms. Isiaho* for the respondent.

8. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-examine, re-evaluate and analyse afresh the evidence adduced before the trial court to reach my own independent determination while taking into account the fact that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

See: ***Arrow Car Ltd V Bimomo & 2 others (2004) 2 KLR 101***; ***Kenya Ports Authority V Kuston (Kenya) Ltd (2009) 2 EA 212.***

9. I have considered the grounds of appeal, the pleadings before the trial court, the evidence on record, the judgment of the trial court and the submissions made on behalf of the parties together with all the authorities cited.

10. It is important to state at the outset that this is an appeal against quantum of damages only as liability had already been agreed upon by the parties as earlier stated. It is settled law that the award of damages is always at the discretion of the trial court. But that discretion being a judicial one must be exercised judiciously in accordance with the law.

11. It is not disputed that an appellate court is empowered by the law to review and interfere with an

award of damages made by the trial court. This jurisdiction must however be exercised with caution. An appellate court can only interfere with the trial court's decision on the award of damages in limited circumstances. These are where it is satisfied that the award was either too high or inordinately low that it had to be an erroneous estimate of the damage suffered or that in arriving at its decision, the trial court took into account irrelevant factors or left out relevant factors or acted on the wrong legal principles.

12. above principle was well captured by the Court of Appeal in ***Mariga V Musila (1984) KLR 251*** when it stated as follows;

> ***"The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..".***
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> See also: ***Kemfo Africa Ltd t/a Meru Express Services (1976) & Another V Libia & Another (1987) KLR 30*** ; ***Arkay Industries Ltd V Amani (1990) KLR 309.***

13. In this case, the respondent's claim against the appellants as can be seen from both the initial and the amended plaint was for general damages for pain and suffering for personal injuries sustained in the accident and for special damages made up as follows;-

(i) Police abstract - Kshs. 100.00

(ii) Treatment expenses – Kshs. 656,453.00

(iii) Medical report - Kshs. 3,000.00

Total - Kshs. 659,553.00

14. In paragraph 6 of the amended plaint, the respondent pleaded that he had sustained the following injuries;

(i) Closed head injury with temporary loss of memory

(ii) Fracture and dislocation of the left hip joint.

(iii) Fracture disruption of the posterior rim of (L) acetabulum with dislocation of the (L) hip joint

(iv) Penetrating wound right knee joint

(v) Severe pains incurred during and after the accident.

(vi) Lumbar spine with vertebral fracture

(vii) Penetrating wound right knee joint

(viii) Multiple soft tissue injuries.

15. In his evidence before the trial court, the respondent testified as PW3 and re-iterated that he sustained the aforesaid injuries in the accident in question. He in addition produced a discharge summary showing that following the accident, he was admitted at Uasin Gishu Memorial Hospital for three months. He also produced in evidence medical reports made by *Dr. Gakuo* (Pexhibit 18); *Dr. Gaya* (Pexhibit 19) and an initial report by *Dr. Mobengi* (Pexhibit 21).

16. In his judgment, the learned trial magistrate after analysing the medical evidence adduced in support of the respondent's claim, the submissions made on behalf of the parties and the authorities cited awarded the plaintiff general damages for pain, suffering and loss of amenities in the sum of Kshs. 1,650,000. However, this amount does not appear to have been taken into account in the computation of the final amount awarded to the respondent as shown above.

17. The appellants in their submissions claim that the award of general damages for pain and suffering was excessive; that it was not commensurate with the injuries suffered by the respondent and that the injuries on which the award was based were different from those actually suffered by the respondent.

18. The Advocates on record for the respondent on their part supported the award claiming that the respondent had sustained severe injuries; that there was evidence that he needed hip replacement and there was therefore need to make provision for future medical expenses.

19. After my re-appraisal of the evidence, I am inclined to agree with the respondent's submissions that indeed the respondent sustained severe injuries in the accident which required him to be hospitalized for a period of about two months or thereabouts. The medical reports adduced in support of the injuries attests to this and that is why all the three doctors namely *Dr. Bwombengi*; *Dr. Z. Gaya* and *Prof. Gakuu* were in agreement that he had suffered varying degrees of permanent disability ranging from 28% to 70%. It is not disputed that the respondent suffered post traumatic osteoathritis and at the time he was testifying in court on 16th September 2009, about 11 years after the accident, he was walking with the aid of crutches. The doctors were also in agreement that he needed total hip replacement in future.

20. Given the severe nature of the injuries sustained by the respondent as summarized herein above, the period of hospitalization and the nature of treatment he had to undergo, I have no doubt in my mind that he must have suffered immense pain and suffering. I am unable to fault the learned trial magistrate for the award of Kshs. 1,650,000 for such injuries. I find no indication in the trial court's judgement that the award was made for injuries other than those sustained by the respondent. In my view, the award was not too high as to be excessive or inordinately low as to lead to an inference that it was an erroneous estimate of the damage suffered. I find the award reasonable. I thus find no basis for interfering with the award and it is hereby upheld.

21. On the award of Kshs. 524,755 and Kshs.519,699 related to the respondent's motor vehicle, it is not clear how the damages were computed and the purpose for which they were awarded. This is because from the evidence on record, if the court was to accept the respondent's claim that he had instituted the suit on behalf of his insurance company under the doctrine of subrogation, the amount the insurance company had paid him for value of the vehicle less salvage value was Kshs. 456, 200 not 524, 755. The only other expenses the insurance company had incurred on his behalf was in the total sum of Kshs. 62,780 not Kshs. 519, 699.

22. Consequently, it is my finding that there was no factual or legal basis to justify the said awards. The amounts were not even pleaded either in the initial or the amended plaint as the respondent's claim was one of damages for personal injuries. The pleadings did not include a claim for compensation for material damage caused to his vehicle. And though the plaintiff introduced evidence in the course of the trial to prove material damage to his vehicle and related expenses, these evidence did not support the respondent's claim as pleaded and ought to have been disregarded. It is trite law that parties are bound by their pleadings and a party should thus not be awarded reliefs which were not sought in his or her pleadings. See: ***Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 others (2014) eKLR.***

23. It is clear from the trial court's judgment that in making the aforesaid awards, the learned trial magistrate proceeded on the basis that the respondent had filed the suit against the appellants under the doctrine of subrogation on behalf of the General Accident Insurance Company Limited which had insured his vehicle. However, this was a misdirection on his part because as stated earlier, a mere perusal of the amended plaint or even the initial plaint shows clearly that the plaintiff's claim was one of compensation for personal injuries and reimbursement of treatment expenses and incidental costs following the

accident. The pleadings do not contain any mention that the respondent in addition to the claim for general damages for pain and suffering was also claiming damages for the pre-accident value of his motor vehicle and other costs on behalf of his insurance company. This claim only arose for the first time when the respondent was giving his evidence. And though his evidence was supported by that of PW2, this did not cure the omission of not expressly including the claim under subrogation rights in the plaint. Claims under the doctrine of subrogation constitute independent and distinct causes of action and must be specifically pleaded in the plaint. Failure to do so is fatal to any such claim. For the above reasons, I find that the trial magistrate erred in making the said awards. The awards are therefore set aside.

24. On the claim for special damages, the amended plaint shows that the respondent pleaded for an award of Kshs. 659,553. But the trial magistrate awarded him a colossal amount of Kshs.2,694,454. It is not clear how the trial court arrived at such an exorbitant award. The law is that special damages must be specifically pleaded and proved meaning that the amount pleaded is the one that must be awarded if strictly proved. As earlier indicated, parties are bound by their pleadings and the respondent was only entitled to the special damages that he had pleaded if he successfully proved them. The learned trial magistrate therefore fell into error when he awarded him special damages far in excess of what he had pleaded without assigning reasons for so doing. There was no basis for such an award and the same must be set aside which I hereby do. It is substituted with an award of Kshs.659,553 which is the amount that was pleaded and proved.

25. In the end, I find some merit in the appeal and it partially succeeds to the extent specified in this judgment. I consequently set aside the judgment of the lower court and substitute it with a judgment of this court in favour of the respondent against the appellants jointly and severally in the total sum of Kshs. 2,309,553 less 20% respondent's contribution of Kshs.461,910. The amount shall attract interest at court rates from date of judgment of the lower court until full payment.

26. On costs, the appellants shall bear the respondents costs in the lower court but since the appeal has partially succeeded, they shall have one third of costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 23rd day of March, 2017

In the presence of:

Miss Kibet holding brief for Ms Isiaho for the respondent

Mr. Magut holding brief for Mr. Akenga for the appellant

Mr. Lobolia Court clerk