



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 27 OF 2015

AGILITY LOGISTICS LIMITED.....APPELLANT

AND

JOHN WAMBUA MUSAU.....1ST RESPONDENT

HARRISON NDUNGI T/a MIANGENI MEAT SUPPLIES....2ND RESPONDENT

(An appeal from the judgment of the Honourable E.G. Nderitu delivered

on 23rd November 2015 in Voi PMCC NO 142 OF 2014 JOHN WAMBUA

MUSAU VS HARRISON NDUNGI t/a MIANGEMI MEAT

SUPPLIES AND AGILITY LOGISTICS LIMITED)

JUDGMENT

INTRODUCTION

1. In her judgment delivered on 23rd November 2015, Hon E.G. Nderitu, Senior Principal Magistrate at Voi Law Courts entered judgment in favour of the 1st Respondent herein as follows:-

General damages	Kshs 750,000/=
Future Medical expenses	Kshs 250,000/=
Special damages	Kshs 11,110/=

2. She apportioned liability at 10% as against the 2nd Respondent herein who was the 1st Defendant in the lower court proceedings with the Appellant who was the 2nd Defendant therein bearing 90% contributory negligence. She indicated that the 2nd Respondent was to pay a sum of Kshs 101,111/= while the Appellant herein was to pay a sum of Kshs 909,999/= and that the defendant (**sic**) was to pay the costs of the suit therein at the same ratio plus interest at court rates from the date of judgment till payment in full.

3. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant lodged its Memorandum of Appeal dated 15th December 2015 on 16th December 2015. The grounds of appeal were

as follows:-

1. THAT the Learned Trial Magistrate erred in law and in fact in assessing and making an award of Kshs 750,000/= as general damages for pain and suffering and loss of amenities in favour of the plaintiff/1st Respondent. The Appellant contends that the said award was manifestly excessive and was not commensurate with the injuries sustained by the Plaintiff/1st Respondent.

2. THAT the Learned Trial Magistrate erred in law and fact in making an award for general damages for pain and suffering and loss of amenities in respect of injuries which were not specifically pleaded in the plaint.

3. THAT the Learned Trial Magistrate erred in law and fact in making an award for Kshs 250,000/= as future medical expenses when the same were not specifically pleaded or sought in the plaint.

4. THAT the Learned Trial Magistrate erred in law and fact in apportioning liability at 90% against the Appellant and 10% against the 2nd Respondent when in fact from the evidence of the 2nd Respondent was equally and/or at least more substantially to blame for the accident, the cause of action herein.

5. THAT the Learned Trial Magistrate erred in law and fact in failing to evaluate the medical evidence adduced by the plaintiff in order to make an informed and fair decision on the award for the general damages.

4. On 28th November 2016, counsel for all the parties herein agreed that this Appeal herein be consolidated with HCCA No 30 of 2015 Harrison Ndungi vs John Wambua Musau purely for purposes of disposing of the two (2) appeals as they both emanated from the same matter in the Trial Court.

5. The Appellant's Record of Appeal was dated 19th June 2016 and filed on 21st June 2016. Its Supplementary Record of Appeal was dated and filed on 16th November 2016. Its Written Submissions were dated 25th January 2017 and filed on 26th January 2017. The 1st Respondent's Written Submissions were dated 20th February 2017 and filed on 21st February 2017. The 2nd Respondent's Written Submissions were dated 20th February 2017 and filed on 21st February 2017.

6. When the parties appeared before this court on 21st February 2017, they requested this court to render its judgment based on the said Written Submissions which they did not highlight but relied on the same in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. Being a first appeal, an appellate court is called upon to evaluate the evidence afresh and come at its own conclusion but keeping in mind that it did not have the advantage of seeing the demeanour of witnesses. This was a position that was held in the cases of Sumaria & Another vs Allied Industries Ltd (2007) KLR 1 and East African Portland Cement Company Ltd vs Tilikia Keloi [2016] eKLR.

8. In the case of East African Portland Cement Company Ltd vs Tilikia Keloi (Supra), it was held as follows:-

“...The position of the law as regards a first appeal is that as the first appellate court, this court has a duty to re-consider the evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing witnesses...”

9. Having looked at the Appellant's grounds of appeal and to the respective Written Submissions, it was clear that the issues that were really before this court for determination were:-

1. Whether or not the apportionment of liability was fair, reasonable and justifiable; and

2. Whether or not the quantum that was awarded was manifestly low as to warrant disturbance by this court.

10. The court therefore addressed its mind to the said issues under the following heads.

I. LIABILITY

11. Ground of Appeal No (4) was dealt with under this head.

12. The Appellant pointed out that although it was denied an opportunity to Cross-examine witnesses or lead evidence, the 2nd Respondent never responded to the 1st Respondent's particulars of negligence he had itemised in his Plea against its driver.

13. It was its assertion that neither the driver of its Motor Vehicles Registration Number KBM 152V ZC 5731 nor the driver of Motor Vehicle Registration Number KBH 351V that was owned by the 2nd Respondent herein were charged with any traffic offence.

14. It further referred this court to the 1st Respondent's evidence in which he had stated that he blamed it and the 2nd Respondent equally and his assertion that had the 2nd Respondent stopped, then the accident ought not to have occurred. It therefore urged this court to find that the 2nd Respondent herein ought to shoulder fifty (50%) per cent of liability under the principle of vicarious liability.

15. On his part, the 1st Respondent stated that he was a lawful passenger in the 2nd Respondent's Motor Vehicle on 3rd March 2014 when the accident occurred and he could not therefore have been found to be liable for the said accident. He contended that the Appellant's driver swerved onto the path of the 2nd Respondent's Motor Vehicle and both vehicles collided and that the Appellant's driver was blamed for having caused the accident as was shown in the Police Abstract Report.

16. He added that the Appellant had an opportunity to call its witness but did not do so and therefore urged this court not to interfere with the apportionment of liability that had been made by the Learned Trial Magistrate.

17. The 2nd Respondent was emphatic that he was not liable for the accident in any way as all evidence pointed to the negligence of the Appellant's driver. It added that it could not be held vicariously liable for the actions of its driver as the 1st Respondent herein was an unauthorised passenger at the material time since the side of his vehicle was clearly written "No unauthorised passenger."

18. It was his contention that his driver was on a frolic of his own when he ferried the Respondent as a passenger, if at all. He denied the Respondent's assertions that they had business dealings and stated that such assertions were an afterthought as he ought to have raised the said issue in his Witness Statement or Reply to his Defence.

19. He further argued that it was incumbent upon the 1st Respondent to have called his driver to testify and having failed to do so, he did not prove that he was a lawful passenger in his Motor Vehicle.

20. According to the proceedings in the Trial Court, the 1st Respondent testified that the 2nd Respondent would pay him commission for sourcing livestock for sale. He denied that he was the 2nd Respondent's employee. In his Cross-examination, he reiterated that he was the 2nd Respondent's Broker.

21. It was his testimony that on the material date, the 2nd Respondent sent them to purchase charcoal at Maungu and it was while they were coming back that they were involved in an accident at about 7.30pm-8.00pm. It was his evidence that they were hit by the Appellant's Motor Vehicle which veered into their lane while avoiding pot holes.

22. Notably, he did not allude to the fact that he had a business relationship with the 2nd Respondent herein in his Witness Statement, a fact that was correctly pointed out by the 2nd Respondent. He had merely stated that he was travelling in the 2nd Respondent's Motor Vehicle.

23. The Appellant herein did not attend court on 28th September 2015 whereupon the Learned Trial Magistrate closed its case. She directed that a Notice do issue to the Appellant to attend court on 12th October 2015. The 1st Respondent's counsel served the Appellant with a Mention Notice dated 28th September 2015 indicating that the matter would be mentioned on 12th October 2015 for purposes of confirming filing of submissions.

24. The Affidavit of Service evidencing the said Mention Notice was duly endorsed with the Appellant's Advocates' official stamp on 30th September 2015 was annexed to the Affidavit of Service of Elizabeth K. Isika that was filed on 8th October 2015. When the matter was called out on 12th October 2015, the Appellant's counsel did not attend court and the Learned Trial Magistrate reserved her Judgment to 19th November 2015.

25. The proceedings of later that day show that the Appellant's counsel attended court and sought to re-open the case on the ground that he had failed to attend court on 12th October 2015 as he was unwell. The 1st Respondent's Counsel opposed the said application on the ground that the Appellant's counsel had had ample time to take appropriate action.

26. The Learned Trial Magistrate rejected the said counsel's application to re-open the case on the ground that he had not tendered in evidence any documentary proof to show that he was unwell on 12th October 2015. The said counsel then sought for time to submit, a request that the Learned Trial Magistrate acceded to.

27. It was evident to this court that the Appellant did not file a formal application seeking to be allowed to re-open its case which request if denied, could have appealed against. Instead, its counsel sought time to file its Written Submissions. It could not therefore be heard to say that it was not given an opportunity to present its case as it never appealed against the said Learned Trial Magistrate's decision before it filed its Written Submissions.

28. It was clear that the Appellant did not rebut the 1st Respondent's evidence on what transpired on the material date as it did not adduce evidence having failed to attend court on 28th September 2015 when the Learned Trial Magistrate closed its case. The 2nd Respondent herein did not also adduce documentary evidence to demonstrate that the 1st Respondent was an unauthorised passenger. Indeed in his List of Documents, the 2nd Respondent had indicated that the documents were **"To be Stated."**

29. Consequently, in the absence of such proof which could have included photographic evidence of his Motor Vehicle or insurance policy showing that the 2nd Respondent's Motor Vehicle had been insured as a commercial vehicle and not as a passenger vehicle, this court came to the firm conclusion that the 1st Respondent was lawfully in the said Motor Vehicle and the 2nd Respondent Appellant was vicariously liable for the actions of his driver at the material time. Indeed, this court was persuaded by the 1st Respondent's submissions that if the 2nd Respondent was contending that he had not authorised him to be in his said Motor Vehicle, then he was in the said Motor Vehicle with the authority of his driver.

30. Notably, the legitimate expectation of any passenger being carried and/or ferried in a motor vehicle is that the driver of such motor vehicle will manage, control and/or drive the said motor vehicle in a manner

that will not cause such passenger. It is therefore well established in common law that a driver such motor vehicle ought to be held wholly liable for any loss, damage or injury that such passenger suffers in case of an accident.

31. For such a passenger to be found liable, it must be demonstrated that he acted and/or omitted to act in a particular manner as a result of which the accident in which he suffered loss, damage or injury, occurred so as to bring him within the ambit of the doctrine of *volenti non fit injuria* and thus bear some degree of contributory negligence.

32. As no evidence was adduced to show that the 1st Respondent contributed to the causation of the accident herein in any manner, liability could only therefore be apportioned between the Appellant herein and the said 2nd Respondent herein.

33. Notably, both the Appellant and the 2nd Respondent did not call their respective drivers as witnesses in this case or any witnesses at all. Although the 2nd Respondent testified in the Trial Court, he was not at the scene of the accident. He could therefore only have controverted the 1st Respondent's evidence by furnishing the Trial Court with documentary evidence.

34. The court perused the Record of Appeal and proceedings but did not find any photographs or sketch plan of the scene of the accident. It therefore resorted to the Police Abstract Report that was adduced by the 1st Respondent herein with a view to establishing liability and extent of liability of the parties herein in the causation of the accident herein.

35. The said Police Abstract report clearly showed that although the matter was referred to insurance, the Appellant's driver was to blame for the accident herein and a charge of careless driving against him was contemplated. In the absence of any other documentary evidence, the only document the Trial Court could fall back on with a view to apportioning liability was the said Police Abstract Report.

36. In Paragraph 5 of the Plaint dated 1 and filed on 1st September 2014, the 1st Respondent itemised the particulars of negligence as follows:-

Particulars of negligence of the driver of M/S Registration No KBH 351V

- a. **Driving at a speed that was excessive in the circumstances.**
- b. **Driving without due care and attention.**
- c. **Failing to have any/or due regard for other road users.**
- d. **Failing to stop, slow down, brake or in any other manner so manage and/or control Motor Vehicle registration No. KBH 351V Toyota Pick up so as to avoid the said accident.**

Particulars of negligence of the driver of M/S Registration No KBM 152V ZC 5731

- a. **Driving at a speed that was excessive in the circumstances R**
- b. **Driving without due care and attention.**
- c. **Failing to have any or any proper control of Motor vehicle registration No. KBM 152V ZC 5731.**
- d. **Failing to have regard for other road users especially the presence of Motor vehicle registration No KBH 351V Toyota Pick up.**
- e. **Colliding into Motor vehicle registration No KBH 351V Toyota Pick up.**

f. Failing to have regard for Traffic regulations and the Highway Code.

g. Driving onto the path of Motor vehicle registration No KBH 351V Toyota Pick up.

g. Failing to stop, slow down, brake or in any other manner so manage and/or control Motor vehicle registration No. KBM 152V ZC 5731p so as to avoid the said accident.

37. Having had due regard to the said particulars of negligence, this court found and held that the 1st Respondent's evidence as to what transpired therefore remained un rebutted. It was persuaded to find and hold that the 2nd Respondent's driver ought to have slowed down, stopped or in any other manner manage the subject Motor Vehicle so as to avoid coming into collision with the Appellant's Motor Vehicle which had veered off its lane.

38. The fact that the Appellant's Motor Vehicle veered into the lane of the 2nd Respondent's Motor Vehicle was indicative of excessive speed which caused the driver to lose control of the said Motor Vehicle as was contended by the 1st Respondent herein of which it must therefore shoulder a greater part of the liability. This was irrespective of the fact that his driver had been trying to avoid pot holes on the said road.

39. If the 2nd Respondent's exercised due diligence to avoid colliding with the Appellant's Motor Vehicle, this court will never know as he did not testify in the Trial Court. He must therefore shoulder some contributory negligence.

40. This court thus found itself in agreement with the Learned Trial Magistrate's apportionment of liability at ninety (90%) per cent against the Appellant and ten (10%) per cent against the 2nd Respondent herein was fair and reasonable in the circumstances of the case herein.

41. In the circumstances foregoing, Ground of Appeal No (4) of the Appellant's Appeal was not merited and the same is hereby dismissed.

II. QUANTUM

42. Grounds of Appeal Nos (1),(2) and (5) were related and they were all dealt with under this head.

43. However, as the question of general damages, future medical expenses and special damages were distinct awards, this court dealt with them separately. Notably, the 2nd Respondent did not submit on this issue but wholly concurred with the Appellant's submissions in their entirety.

A. GENERAL DAMAGES FOR PAIN AND SUFFERING

44. The Appellant submitted that a sum of Kshs 750,000/= general damages for bruises on the face, tenderness over the chest and left shoulder dislocation was manifestly excessive in the circumstances of the case herein. It pointed out that in his testimony, PW 1 stated that he sustained two (2) fractures of the ribs, cuts wounds on the face and leg and a fracture of the left arm which necessitated the insertion of a metal plate.

45. It was categorical that the Plaintiff did not allude to the fracture of the two (2) ribs and that the P3 Form did not also mention the said fractures. In addition, it stated that the Medical Report by Dr Hanif M Z (hereinafter referred to as "PW 2") and the Plaintiff did not mention any injuries to the 1st Respondent's leg.

46. It was its submission that a doctor's evidence is intended to corroborate what a plaintiff has indicated in his plaint and not to introduce another case. It was emphatic that the failure by the 1st Respondent to have indicated all the injuries he said that he sustained and the fact that he required future medical expenses was intended to steal a march from it.

47. It also went to details of defining what a dislocation, fracture, shoulder and humerus bone and argued that a shoulder can only be dislocated or sprained but was not capable of being fractured. It was therefore its contention that the assertion that the 1st Respondent suffered a dislocation fracture to have been ambiguous and the Learned Trial Magistrate erred when she replaced the term “left dislocation fracture” with “a fracture of the left proximal 1/3 humerus.”

48. It was its further submission that the 1st Respondent was bound by his pleadings and referred this court to several cases where the common thread was that parties cannot depart from their pleadings. In one of the cases, **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR**, the Court of Appeal rendered itself as follows:-

“...parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce...”

49. It also stated that the indication in the P3 Form completed on 11th July 2014 that the 1st Respondent’s injuries sustained on 3rd March 2014 were five (5) months old either meant that PW 2 never examined the 1st Respondent or the observations therein were an unreliable conjuncture.

50. It submitted that the 1st Respondent sustained soft tissue injuries and that an award of Kshs 200,000/= general damages was adequate to compensate him. It relied on the unreported cases of **Nairobi HCCC No 4682 of 1987 Yusuf Juma vs Akamba Public Road Services Ltd & Another**, **Mombasa HCCC No 263 of 1988 Paul Mwangangi vs Commercial Transport Ltd & Another** and **Mombasa HCCC No 613 of (sic) Japheth Chea Shama vs Nairobi Deluxe Services Ltd** where the courts awarded general damages ranging between Kshs 70,000/= - Kshs 150,000/= where the main injury was a fracture dislocation of the shoulder.

51. On his part, the 1st Respondent admitted that the P3 Form was completed after he was treated and contended that there was no law that expressly objected to the P3 Form being filled after a person had been treated. He added that the Learned Trial Magistrate did not only rely on the Medical Report in arriving at the conclusion of what the 1st Respondent sustained and had due regard to the two (2) Discharge Summaries he had tendered in evidence.

52. He also pointed out that there was no difference between a fracture of the left proximal 1/3 humerus and dislocation of the shoulder and that the Appellant was only insisting on the dislocation and ignoring the fact that the 1st Respondent also sustained a fracture. It was therefore his submission that the Learned Trial Magistrate did not err when she found that the P3 Form and the two (2) Discharge Summaries had no discrepancy and thus awarded him a sum of Kshs 750,000/= general damages.

53. This court had due regard to Paragraph (7) of the Plaint and noted that the 1st Respondent sustained the following injuries:-

- a. **Bruises on the face.**
- b. **Tenderness over the chest.**
- c. **Left shoulder dislocation fracture.**

54. In his evidence, the 1st Respondent contended that he suffered two (2) ribs on the right and left, cuts on the face and leg and fracture of the left upper arm. In his Witness Statement, he had stated that he suffered injury to the face, chest and left arm. According to the P3 Form, he was said to have suffered bruises on the face, tenderness on the chest and left shoulder dislocation fracture.

55. Notably, the approximate age of injuries in the P3 Form was shown to have been two (2) hours. However, the said P3 Form was completed on 11th July 2014 and making the contentions therein that the

age of injuries was possibly two (2) hours at the time of his examinationan impossibility.

56. Turning to the Discharge Summary Sheet dated 8th March 2014 from Moi Hospital, Voi, it showed that the 1st Respondent was admitted on 3rd March 2014 which was the same date of the accident and discharged on 8th March 2014. He was said to have suffered an injury to the upper arm. The second Discharge Summary from the same hospital indicated that the 1st Respondent was admitted on 9/04 (sic)and was discharged on 14th April 2014. It showed that the 1st Respondent had a fracture of the upper arm.

57. The Medical Report dated 11th July 2014 by PW 2 showed that the 1st Respondent had suffered a fracture of the left proximal 1/3 humerus and was discharged from Moi Hospital Voi on 8th March 2014 and was re-admitted on 9th April 2014 for ORIF under general anaesthesia and then discharged on 14th April 2014. At the time of the medical examination, the 1st Respondent was still complaining of pains on the left elbow.

58. In his prognosis, PW 2 stated that the 1st Respondent would require intense physiotherapy for three (3) months costing Kshs 50,000/= and thereafter would need to be reviewed every three (3) months and that further the plates and screws were to be removed after two (2) years and would cost Kshs 200,000/=.

59. This court agreed with the 1st Respondent that the Appellant had transformed himself into an expert on the medical terms. Be that as it may, as the issue had been raised, this court took the liberty of looking up the meaning of what a humerus fracture was and noted from <https://en.wikipedia.org/wiki> that the definition had been given as follows:-

“A humerus fracture is a bone fracture of the bone of the upper arm, the humerus. Fractures of the humerus may be classified by the location of the fracture and divided into fractures of the proximal region, which is near the shoulder”

60. In www.physioworks.com.au/injuries-conditions, the definition of humerus was given as:-

“The *humerus* is your upper arm bone *between* your *shoulder* and elbow”.

61. It did therefore appear to this court that PW 2 had used a medical term and in the absence of any evidence to the contrary, this court agreed with the observation by the Learned Trial Magistrate that there was no discrepancy in the usage of the term dislocation fracture and fracture of the left proximal 1/3 humerus and she was correct in using the two (2) terms interchangeably.

62. On the issue of whether or not the shoulder could fracture and dislocate at the same time, this court had due regard to the cases the Appellant had relied upon in which it was clear that they were in respect of fracture dislocation of the shoulder. The Appellant’s assertions that a shoulder could not fracture and dislocate were thus rendered redundant or obsolete by the very authorities it relied upon.

63. Appreciably, it is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR and those of Mumias Sugar Company Limited vs Julius Abuko Shibia [2015] eKLR and Mwangi vs Wambugu [1984] KLR that were relied upon by the 1st Respondent.

64. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an

injury.

65. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

66. Indeed, in the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

67. Remaining faithful to the doctrine of *stare decisis*, this court therefore looked at recent cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein. It found it necessary to look at several cases dealing with different injuries to give the parties a sense of awards that have been awarded by different courts in the recent past as it has noted that there is a tendency by advocates dealing with injury claims to rely on very old cases and propose outrageous figures.

68. This is despite there being a dearth of recent jurisprudence in this area. Reliance on such obsolete cases does little in the development of jurisprudence. It is highly recommended that parties try as much as possible to submit on comparable cases to avoid the courts wasting time doing research for them.

69. Having taken into account the inflationary trends, this court nonetheless found that the award of Kshs 750,000/= general damages was manifestly excessive warranting interference by this court. It was its view that bearing in mind that screws and plates were inserted and would need to be require removal of the same connoting the seriousness of the injuries the 1st Respondent sustained, a sum of Kshs 500,000/= would be adequate compensation.

70. In arriving at the said figure, this court had due regard to the case of **Patrick Kinoti Miguna vs Peter Mburunga G. Muthamia [2014] eKLR** where Makau J upheld the Learned Trial Magistrate’s award of Kshs 300,000/= general damages in a case where the respondent therein had sustained *shoulder dislocation, left and right leg injuries, injury to the forehead, two loose teeth(one tooth extracted later), injury on the left chest area and right knee areas*.

71. **George Kinyanjui t/a Climax Coaches & another vs Hassan Musa Agoi [2016] eKLR**, where Kimondo J reduced the award of Kshs 800,000/= general damages to Kshs 450,000/= where the respondent therein had sustained *two loose teeth, blunt trauma to the neck and chest, fracture of the left clavicle, fractures of the 4th and 5th left ribs, blunt trauma to the spinal column and right scapula area and dislocation of the left shoulder*.

72. In the circumstances foregoing, this court found merit in the Appellant’s Grounds of Appeal Nos (1), (2) and (5) and the same are hereby upheld.

B. FUTURE MEDICAL EXPENSES

73. Ground of Appeal No (3) was dealt with under this head.

74. In Paragraph 7 of his Complaint, the 1st Respondent particularised his claim for special damages as follows:-

- | | |
|----------------------|--------------|
| a. Medical Report | Kshs 3,000/= |
| b. Copies of Records | Kshs 1,500/= |

c. Treatment expenses

Kshs 6,610/=

Kshs 11,110/=

75. He had sought the following reliefs in his Plaint:-

a. **Kshs 11,110/=**

b. **General damages for pain and suffering and loss of amenities**

c. **Costs and Interest**

76. Notably, the Appellant did not appear to object to the sum of Kshs 11,110/= that was awarded as special damages. However, it objected to the sum of Kshs 250,000/= that was awarded for Future Medical Expenses. It was emphatic that the Learned Trial Magistrate erred as the 1st Respondent had not claimed for the said sum in his Plaint.

77. The 1st Respondent argued that PW 2 had set out the cost implications of removing the screw and plate from his shoulder and these were costs that he would have to incur if he was to live free of foreign bodies. It was his submission that disallowing of the said sum of Kshs 250,000/= would be a miscarriage of justice.

78. Notably, this court did not see indication of the 1st Respondent having amended his Plaint to include the said claim for Future Medical Expenses despite having had ample time to amend his pleadings before the matter proceeded for trial.

79. Indeed, a trial court must not determine questions that are not clearly before it as it has the potential of given one party undue advantage. The Appellant and the 2nd Respondent were ambushed in the Judgment as they would not have reasonably expected the 1st Respondent to have been awarded what had not been pleaded.

80. There is every likelihood that if the amount had been pleaded in his Plaint, both the Appellant and the 2nd Respondent may have opted to seek a second medical opinion on the cost of future expenses. While it is pitiable that the 1st Respondent will have to fork deeper in his pockets to cater for these future medical expenses, this is a court of law that is governed by rules of procedure. The 1st Respondent must suffer the consequences of his failure to amend his pleadings.

81. It was evident that the said Learned Trial Magistrate had misdirected herself and applied the wrong principles in making an award for future medical expenses yet the 1st Respondent was bound by his pleadings which did not include the said claim. The Appellant was thus justified in contending that the Learned Trial Magistrate appeared to have effected the amendment on the 1st Respondent's behalf and determined matters that were clearly not before her.

82. In this respect, this court found that there was merit in Ground of Appeal No (3) and the same is hereby allowed and the award of the sum of Kshs 250,000/= is hereby set aside.

C. SPECIAL DAMAGES

83. There was no indication that either of them were objecting to the award of Kshs 11,100/=. This court did not therefore interfere with this claim as both the Appellant and the 2nd Respondent did not submit on the same.

DISPOSITION

84. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal was dated 15th December 2015 and filed on 16th December 2015 was partly successful.

85. In this respect, this court hereby sets aside the judgment that was entered into in favour of the 1st Respondent against the Appellant and the 2nd Respondent by the Learned Trial Magistrate on 23rd November 2015. In its place, this court hereby enters judgment in favour of the 1st Respondent against the Appellant and the 2nd Respondent herein for sum of Kshs 511,110/= made up as follows:-

General Damages	Kshs 500,000/=
Special damages	<u>Kshs 11,110/=</u>
	Kshs 511,100/=

together with costs and interests therein until payment in full.

86. Apportionment of liability shall remain at 90% against the Appellant and 10% as against the 2nd Respondent herein. For the avoidance of doubt, the Appellant's and 2nd Respondent's share of the decretal sum shall be Kshs 459,990/= and Kshs 51,110/= respectively together with costs and interest in the same ratio.

87. As the Appellant was only partly successful in its Appeal, each party shall bear its own costs.

88. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2017

J. KAMAU

JUDGE