REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 4 OF 2015

KIP MELAMINE LTD & ANOTHER ….....…1st APPELLANT

FAYAZ AZIM LADHA ……..……2nd APPELLANT

Versus

VIOLENT WAITIRI GICHIA …….....…… RESPONDENT

(Being an appeal from the original decision from Hon. V.K Kiptoon –Ag. Senior Resident Magistrate dated 29/8/2014 Nanyuki Chief Magistrate Court Criminal Case No. 31 of 2011)

JUDGMENT

1. This is an appeal against the decision before the Chief Magistrate Court Nanyuki on quantum of damages resulting from a car accident.

2. Before the Chief Magistrate's Court Nanyuki, Violet Watiri Gichia **(Violet**) sued Kip Melamine Co. Ltd and Fayaz Azim Ladha the appellants claiming both general and special damages that resulted from a car accident. Parties in the course of the hearing before the Chief Magistrate recorded a consent on Liability of 70:30 in favour of Violet.

3. The trial court by its judgment dated 29th August, 2014 awarded Violet the following:

(a) Special damages of Kshs. 230,706/=,

(b) Future medical expenses Ksh. 260,000/=

(c) General damages 70 x 100 x 900= 720

Total sum of Ksh. 1,210,706 plus interest **and costs.**

4. The appellants have appealed against that award on the following grounds:

(a) THAT the learned trial Magistrate erred in law in awarding special damages that had been settled by the Respondent's Insurance Company thereby double compensating the Respondent.

(b) THAT the learned trial Magistrate erred in law in awarding special damages that were not strictly proved as required in law.

(c) THAT the learned trial Magistrate erred in law in awarding the claim for future medical

expenses which claim was not strictly proved as required in law.

(d) THAT the learned trial magistrate erred in law in failing to subject the net ward to the agreed apportionment on liability and instead applied the same partially without offering any reasons.

5. The limit within which the first appellant court operates while hearing an appeal was discussed by the court appeal in the case: **MARGARET NJERI MBUGUA-V- KIRK MWEYA NYAGA [2016)eKLR viz:** The case of **Abok James Odera t/a A. J. Odera & Associates - V- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR,** this court said the following with regard to the duty of a first appellant court:

"***This being a first appeal, we are reminded of our primary role as a first appellant court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited [2009]2EA 212 wherein the Court of Appeal held, inter alia, that:-***

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".

6. On the first ground of appeal the appellant submitted that the special damages claim for medical expense should not have been awarded by the trial court because Violet confirmed that her medical expense was paid for by Insurance.

7. Violet through her Counsel's written submissions failed to give substantive response to the appellant submission on that ground. Violet Learned Counsel submitted that it was "**incumbent upon the appellant(s) to conduct fully conduct the discovery process to trial date".**

ANALYSIS ON GROUND (a)

8. On this first ground of appeal I will begin by referring to Violet's evidence before the trial court. When Violet was cross examined in respect to the receipts of medical expense this is how she responded:

"***An invoice was billed at KPA where my husband is covered. Some of the bills were part (sic) under the cover of my husband who works for standard group".***

9. Although Violet's Learned Counsel submitted that the appellants should have undertaken discovery before trial- it is important to restate the principle of law that 'whoever alleges must prove'. This principle is supported by **Section 107 of the Evidence Act,** that:

"***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".***

10. The application of that Section to the facts to this case is that it was Violet who desired that the trial court would give her an award in special damages for injuries she suffered. That being so she had the burden to prove the same. By her own evidence under cross examination Violet admitted that some of her medical expenses were paid for by her husband's insurers.

11. Two issues arise from her testimony about the Insurance cover. The first is what amount of Ksh. 328,106, she claimed by her amended plaint, was paid for by the Insurance and what amount did she herself pay. She had a burden to prove the amount paid by the Insurance and by her by as provided under Section 107 of the Evidence Act. Having failed to distinguish what was paid for by the Insurance, which cannot be refunded to her as discussed below, and what she herself paid this court cannot and similarly

the trial court could not make an award in special damages for medical expenses. The second issue raised by the evidence of Violet is that if she intended to claim the amount paid by the Insurance she was thereby invoking the principle of subrogation. If so she had not so pleaded in her amended plaint – nor had she specifically proved the same. This is what was stated in a case by **Kwazulu -Natal High Court in South Africa** namely: **NKOSI-VS- MBATHA (AR 20/10) (2010) ZAKZPHC 38** where the court stated:

> "***However, the plaintiff said it for the first time under cross examination that she was proceeding against the defendant on behalf of the insurer for the recovery of the costs of repairs the insurer paid to her. It does not appear from the plaintiff's pleadings that she was so suing. I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleadings is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See Robinson V Randfontein Estates G M Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ.The party is therefore not allowed to direct the attention of the other party to one issue and at the trial attempt to canvass another NYANDENI–V-NATAL MOTOR INDUSTRIES LTD 1974 (2) SA 274 (D). In the request for further particulars the plaintiff was specifically asked whether the motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The plaintiff refused to answer the questions posed to her on grounds that the information requested was not required for Pleading. In my view, the plaintiff had thereby misled the defendant as to the time and correct state of events and as to the nature of her claim".***

12. It follows that the appellants on ground (a) of their appeal wholly succeed. Having succeed the appellants also succeed on ground (b) of their appeal which faulted the award of special damages. This award is the same that Violet admitted was partially paid for by the Insurance.

13. On ground(c) of the appellants' appeal they are aggrieved by the trial court's award for future medical expenses. In the appellants view this should not have been awarded because Violet had not pleaded it and had not proved it. Appellants relied on a High Court decision in the case: **ZACHARIA WAWERU THUMBI -V- SAMUEL NJOROGE THUKU [2006]eKLR** where the court stated:

> ***"It is on the foregoing basis that in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. (See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002 at page 760]".***

14. Violet through her learned Counsel submitted that the claim for future medical expenses had been pleaded and proved by the medical report of Dr. G K Mwaura.That doctor by plaintiff exhibit No.6, a medical report, stated that violet would require Ksh. 250,000 for future surgery.

ANALYSIS OF GROUND (C)

15. The Learned trial Magistrate by his considered judgment awarded Violet Ksh. 260,000 for future medical expenses. The learned trial Magistrate in making that award paid attention to Violet's evidence that that would be the amount she would be required to pay. Violet's evidence on future medical expense was not subjected to cross examination by the appellants and accordingly the court was entitled to take it as being unchallenged.

16. In my view the High Court decision in **WAWERU THUMBI case (supra)** that future medical expenses cannot be awarded is not in tandem with the realities of Kenyan Society. It may apply to more advance societies but not Kenyan. The reality in Kenya is that due to financial constraints many accident victim cannot always afford to pay for future medical treatment. They more often than not await for the court's award to cover such treatment. The court of appeal in accepting that a claim for future medical expenses is a claim in special damages, held that future medical expenses can be claimed. This was stated in the case **SIMON TAVETA – v- MERCY MUTITU NJERU [2014] eKLR viz:"the** case of **Kenya bus Services Ltd – V- Gituma, (2004) EA 91**, this court stated:

> *"**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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person's legal rights should be pleaded".***

17. The appellants erred to submit that the future medical expense was not pleaded. In that regard I draw their attention to the proceedings at the trial court of 14th February 2014. Those proceedings show that Violet was granted leave to further amend her plaint to claim for future medical expense of Ksh. 260,000.

18. In my view the trial court should however have paid attention to the plaintiff's exhibit No. 6 the medical report of Doctor G K Mwaura who estimated that future medical expenses was Ksh. 250,000 and not Ksh. 260,000/=.

19. It follows that the appellant ground only succeeds to the extent that the award for future medical expense shall be reduced by Ksh. 10,000/=because that was what Violet proved with her exhibit No. 6.

20. The appellants by their ground (d) of their appeal faulted the learned trial court for having failed to apply the consent on liability of 70:30, in favour of Violet, in all the amounts awarded by the court.

21. Violets response to that ground was that the consent on liability did not apply to the award of special damages.

ANALYSIS OF GROUND (d)

22. I beg to differ with Violets submissions that the consent on liability did not apply to the award of special damages. The consent on liability referred to the whole claim that Violet brought against the appellant which must include the award in special damages. On that ground the submissions of Violet are rejected and the appellant succeeds wholly on this ground.

23. The appellants attempt to attack the trial court's award in general when the same was not raised in the grounds of appeal is rejected.

24. In the end the judgment for the respondent in this appeal is an follows:

(a) Future medical expenses Ksh. 250,000/=,

(b) General damages Ksh. 900,000/=,

(c) The awards in (a) and (b) above are reduced by 30% being respondent's contribution for the accident.

(d) There shall be interest on (a) and (b) above at court rate.

(e) The appellant is award ½ costs of this appeal.

Dated and Delivered this 22nd Day of June 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

1st Appellant: Kip Melamine Company Limited …….…….

2nd Appellant: Fayaz Azim Ladha …….

Respondent: Violet Watiri Gichia ……..

For Appellant: ….....

For Respondent ……..

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE