Iriaini Tea Factory v Manianyu (Civil Appeal E013 of 2023)
[2024] KEHC 13267 (KLR) (24 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E013 OF 2023

DKN MAGARE, J

OCTOBER 24, 2024

BETWEEN

IRIAINI TEA FACTORY ..... APPELLANT

AND

SIMON KAMANIA MANIANYU ..... RESPONDENT

(Being an appeal from the Judgment of Hon. N.W. Wanja - RM in Othaya PMCC No. E002'B' of 2021 delivered on 20th February, 2023)

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Hon. N. W. Wanja – RM given on 20/2/2023 in Othaya PMCC E002'B' of 2021. The Appellant was the defendant in the suit in the lower court.
2. The Respondent filed suit on 28/9/2021 claiming damages for injuries arising from an accident that occurred on 3/11/2020 when the plaintiff was walking as a pedestrian along Ruruguti-Kihuri road involving motor vehicle Reg. No. KBA 102T Isuzu NOR.
3. The plaintiff is said to have been hit by a side mirror and dragged on the tarmac over an unknown distance. The Respondent pleaded that they suffered the following injuries:
    a. Scalp laceration 4 cm occipital region.
    b. Right femur compound fracture.
    c. Extensive degloving injury over the right thigh approximately 20*20cm.
    d. Grazes over the right buttocks with skin loss.
    e. Permanent disability estimated at 25%.

4. The court heard the matter and delivered judgment on 20/2/2023 in the following terms:-

    Liability 80:20

    Special damages – Kshs. 89,785/=

    General damages – Kshs. 3,764,785/=

    Less contribution – Kshs. 752,957/=

    Total - Kshs. 3,011,828/=

5. The Appellant was aggrieved and appealed to this court setting out four grounds of appeal as follows:-

    a. The learned trial magistrate erred in law by awarding loss of earnings that were inordinately high and which were neither specifically pleaded nor strictly proved.

    b. The learned trial magistrate erred in law by awarding general damages for pain and suffering that were inordinately high.

    c. The learned trial magistrate gravely erred in law by finding that the plaintiff is entitled to general damages for pain, suffering and loss of earnings of Kshs.3,600,000/=.

    d. The learned trial magistrate gravely misdirected himself in law in failing to consider and analyze the Appellant's closing written submissions.

6. The appeal is basically on quantum and raises the following issues;-

    i. Loss of earnings that were inordinately high and not pleaded.

    ii. Excessive general damages.

7. I shall disregard the fourth ground as it is not a proper ground.

Evidence

8. The matter was adjourned for a considerable number of times with no basis until a consent was recorded apportioning liability on 15/7/2022 and the matter was left for submissions.

9. There was no evidence taken or produced. After the consent the plaintiff was to undergo a second medical examination and the matter was mentioned several times until 19/10/2022.

10. The court then analyzed documents which had neither been admitted in evidence nor testimony admitted. I shall revert shortly on this.

Analysis

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

    " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

14. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The first Appellate court is not bound necessarily to accept the findings of fact by the court below in particular where he failed to take into consideration the evidence on record. In the case of Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, Law JA stated as follows:-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

19. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

20. In deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

21. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

22. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

23. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. The award is simply not justified from evidence.

24. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -v- Republic* [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

25. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

26. The court below was entitled to rely on evidence on record. However none was on record. There was therefore no basis for finding or awarding general damages. It will be dishonest for this court to analyze non-existent evidence. Accordingly award of general damages is untenable and is thereby set aside.

27. The second aspect relates to loss of earnings or loss of earning capacity. The court was at pain to deal with this limb but it was not emanating from pleadings. There is no plaint dated 15/8/2022. To the contrary these were submissions. Submissions however detailed, do not amount to pleadings. Section 35(1) of the *Evidence Act* provides as follows:

> In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact.

28. The parties did not produce any evidence. They stated that they were relying on submissions. There was no fate given on the oral evidence, witness statements and list of documents. There was a consent on liability and nothing more. To make matters worse, there was a second medical report obtained after the consent and nothing was said of it. There were no facts upon which the court could base its findings. Only unleaded matters can be dealt with by way of dismissing them.

29. In *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, Odunga J as he was then posited as follows: -

> " 9. That averments in pleadings are not evidence was appreciated in *Francis Otile v Uganda Motors Kampala* HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & Another v Haidara* [1972] EA 166 where that the contents of a plaint are only allegations, not evidence. According to Edward Muriga through *Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. v Cruisair Ltd. (No. 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:
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> > " Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an 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. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."

10. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

> "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".

11. Again in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

12. It would seem that the parties, and particularly the Plaintiff/Appellant believed having recorded a consent on liability each party was at liberty to rely on the documents filed with the plaint without the same being formally produced in evidence in support of the quantum. It was not stated that the said documents were to be produced in evidence because the consent did not deal with the calling of witness."

30. Submissions are not part of evidence in a case. In the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 the learned Judge expressed himself as follows:

> "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

31. Final submission is a way by which advocates or parties crystallize the substance of the case, the evidence and the law relating to that case. They are not ways of proving a case. In the case of *Ngang'a & Another v Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis

of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

32. Therefore, strictly speaking, submissions cannot take the place of evidence. There must be evidence upon which the court will base its decision. This is more dire in cases where there are issues of demeanor of witnesses. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR posited as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

33. In that connection, this court and the court below cannot base their decision on conjecture and hyperbole. It is the nadir of practice and malaise to simply proceed without evidence. I have seen lengthy submissions by both sides but they are based on a misnomer. There are no documents on record. Lists of documents are not documents until they are produced.

34. The plaintiff must attend court and produce evidence in support of his case, if there are disputes related to medical evidence, they must be settled through testimony. At some stage I got a definite feeling that there is a possibility that the Respondent is a phantom one. He was unavailable for a second medical evidence for unreasonably long time and did not testify. I do not know where the court got evidence for which it made findings on quantum and special damages.

35. I am not oblivious to the fact that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. Lord Morris of Borth-y-Gest had occasion to comment on the above concept in the case of *H. West and Son Ltd v Shepherd* (1964) AC.326 and stated thus:

> " ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

36. The principles upon which this court should proceed are those stated in the case of *Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini v A. M. M. Lubia & Another*. [1998]eKLR.

> " .... It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

37. For the court to set aside award of damages, it must be shown that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect. The court remembers that

it is the magistrate who heard the evidence. What then happens where the court did not hear evidence? in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the Court of Appeal in held:-

> 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. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....

38. It must be recalled that the question as to quantum of damage is one of fact for the trial court and as such the principles of law enunciated in the decided cases are only guides. In *Bash Hauliers Limited v Anastacia Ndinda Kimonye* [2020] eKLR , Justice G V Odunga, stated as doth: -

> " 49. That was the position in *Woodruff v Dupont* [1964] EA 404 where it was held by the East African Court of Appeal that:
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> "The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them... The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

39. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and distilling the matters for the court to decide. A party cannot throw to the court pleadings and documents and purport that they have proved their case. In the case of *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* [2019] eKLR, the court stated as follows: -

> " The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court on the principles of good pleading: -
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> > " In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.

> While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.
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> ... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.
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> Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."

> 88. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

40. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.

41. The Court of Appeal in *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* rendered itself as follows:

> " A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-
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> > " The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

42. The prayer for loss of earning capacity or even future earnings was not pleaded and is therefore dismissed. This also applies to future medical expenses. These were not pleaded. They cannot be introduced by way of submissions. Therefore, that claim is dismissed.

43. On special damages, the same must be specifically pleaded and proved. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the court of appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
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> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

44. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag JA. - held:
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> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

45. There was no basis on which the court awarded special damages in absence of any documents being produced in evidence or oral testimony by any of the parties.

46. The next question therefore will be what to do with the case. The Court of Appeal has for umpteenth time stated that before a case is proved, it must be pleaded. Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> "11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria

in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

47. In the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In the case of *Raila Amolo Odinga & Another v IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

48. In this case only two aspects were pleaded – special damages and general damages. The claims which were added; that is future medical expenses and loss of earnings cannot be introduced now. Therefore, they remain dismissed whichever order I give hereinafter. The only issue that remains is what to do with pleaded prayers.

49. Both sides contributed to the imbroglio the parties find themselves in. The Respondent is not entirely to blame. Though sections 107 -109 of the *Evidence Act* place the burden of proof on a party who would fail if no evidence at all were given on either side, which in this case is the Respondent, the circumstances do not warrant a punishment on the said party. Sections 107 to 109 provides as follows:

> " 107.
>
> (1) 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. who would fail if no evidence at all were given on either side
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. The court is of considered view that both sides were at fault for proceeding the way they did. This is the situation which Order 42 Rule 26 provides for as one of the orders this court can give as follows:

> If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be had.

51. In this case, after dismissing the unpleaded issues, the court notes that the proceedings were a nullity there having been no hearing. Even where parties proposed to proceed via submissions there must be evidence on pleaded issues. List of documents is not part of the record and judgment must follow evidence.

52. In this matter, both parties were to blame for a null judgment. Unfortunately for a nullity, there is nothing that can be added to it. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, Lord Denning delivering the opinion of the Privy Council at page 1172(1) said:

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

53. In the circumstances after setting aside the judgment on general damages and special damages I shall remit the matter to the court below to hear evidence and have documents produced in a proper hearing and determine two question: -

i. Whether special damages pleaded of Ksh. 89,785/= has been proved.

ii. General damages for pain, suffering and loss of amenities as pleaded in the plaint dated 20/9/2021.

iii. Costs.

54. The court shall not deal with or include claims that I have dismissed herein. Whichever the results of the case in the court below, having declared proceedings after 15/7/2022 null and void, each party shall bear costs in that court for the null proceedings other than the proceedings that will be undertaken henceforth.

55. I also note that the award given by the court does not emanate from the pleadings and it is inordinately excessive even if one had to rely on the unadmitted documents. In view of that the matter shall proceed before any court other than Hon. N. W. Wanja (RM).

56. On costs, though the Appellant has succeeded, they are equally to blame for consenting to proceedings that were a nullity. In the circumstances, each party shall bear its own costs for the appeal.

Determination

57. The upshot of the foregoing is that I make the following orders:

a. The judgment delivered herein on 20/2/2023 is a nullity and is hereby set aside in toto.

b. The appeal on future medical expenses, loss of earnings is allowed and awards dismissed for not being pleaded.

c. The matter shall be remitted to the lower court for rehearing before a court other than N.W. Wanja on the following questions only, that is:-

i. General damages.

ii. Special damages of Kshs. 89,785/=.

iii. Costs.

d. The court shall not deal with any other issue other than (c) above and must do so upon hearing evidence.

e. Each party shall bear their own costs in this matter.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ontita for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah