REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 19 OF 2020

JONATHAN JUNIOR NYAMASYO KATETE *a.k.a*

JONATHAN KATETE.....APPELLANT

VERSUS

GIDEON MUANGE MUASA *a.k.a*

GIDEON MUASA.....RESPONDENT

Being an appeal from the judgement of Honourable R.W.

Gitau RM) at Mavoko Chief Magistrates' Court in CMCC

No. 299 of 2019 delivered 27th day of January 2020)

BETWEEN

GIDEON MUANGE MUASA GIDEON MUASA *a.k.a*.....PLAINTIFF

VERSUS

JONATHAN JUNIOR NYAMASYO KATETE *a.k.a*

JONATHAN KATETE.....DEFENDANT

JUDGEMENT

1. Vide Memorandum of Appeal dated 17th day of February 2020 the Appellant appeals against the whole judgement of Hon R.W. Gitau Resident magistrate in **Mavoko PMCC No. 299 of 2019** wherein she awarded general damages of Kshs 1,000,000/, KSHS 150,000/ for future medical expenses , Special damages of Kshs 71,800/ all subjected to 15% contribution coming to Kshs 1,038,530/. Being aggrieved, the appellant set out the following grounds of appeal;

a) That the learned trial magistrate erred in law and in fact in failing to take into consideration relevant issues and taking into account irrelevant issues while addressing the issue of quantum of damages.

b) That the learned trial magistrate erred in law and in fact by awarding the Respondent General damages of Kshs. 1,000,000 which is inordinately high.

c) That the learned trial magistrate erred in law and in fact in holding that the authorities provided were distinguishable from the Plaintiff's case thereby reaching a wrong conclusion.

d) That the learned trial magistrate erred in law and in fact by relying on the Respondent's / Plaintiff's evidence over the Appellant's /Defendant's evidence on a wrong basis.

e) That the learned trial magistrate erred in law and in fact in awarding the Respondent Kshs. 150,000 as future medical expense

when there is evidence against such award.

2. The appeal was disposed of by way of written submissions.

3. The Appellant filed his submissions dated 14.12.2020 wherein it was submitted that the appeal is challenging the quantum awarded by the trial court upon a consent on liability entered by the parties. It was submitted that the Respondent suffered a fracture to the acetabulum and soft tissue injuries to the right hip as well as bruises on the right leg and should have been awarded Kshs. 400,000 as opposed to Kshs. 1,000,000. It was contended that the learned magistrate had fallen into error in relying on the case of **Fred Ogada Azere and Another vs Ezekiel Kiarie Nganga (2019) eKLR** where the injuries sustained were not commensurate to the current case involving the respondent. In support of the said contention, counsel placed reliance on the cases of **Jabane vs. Olenja (1986) KLR 661, Civicon Limited vs Richard Njomo Omwancha & 2 others (2019) eKLR, Faith Mumbua Kiio vs Patel Devika (2018) eKLR** and the decisions cited in the lower court being **Josphat Kyalo vs Violet Kanyua Francis (2001)eKLR, John Maseno Ngala & Another vs Dan Nyanamba Omare (2006) eKLR, Benson Kimiri Chege vs Daniel Munjuga and another (2019) eKLR, Muthamiah Isaac vs Leah Wangui Kanyingi (2016) eKLR, Kennedy Okong'o Odhiambo vs James Kariuki (2011) eKLR and John Mwaniki Nduati vs Samuel Muchiri Njuguna (2005) eKLR** and urged the court to consider interfering with the awards.

4. The Respondent's submissions are dated 21.01.2021. Learned counsel submitted that the judgement of the lower court is in tandem with other court decisions on quantum of damages and ought not to be disturbed. On future medical expenses, it was submitted that Dr. Mutunga had opined that the Respondent will need further surgery to remove the metal implant at an estimated cost of KShs 150,000 which is pleaded in the Plaint and hence the same should not be interfered with as it has been proven. Reliance was placed in the case of **Kennedy Ooko Ouma Bachi vs Joseph Maina Kamau (2018) eKLR, Geoffrey Maraka Kim Hong vs Frechiah Hugiri (2020) eKLR** and **Mary Maina vs Joseph Maingi Wambua (2020) eKLR.**

5. This being a first appeal, the role of this court is to evaluate the evidence afresh and come up with an independent conclusion as to whether or not to uphold the decision of the trial court. The record shows that the Respondent's case arose out of an accident that occurred on 21.3.2018 along Mombasa Road involving motor vehicles registration numbers KBM 056A which was being driven by the Appellant and in which the Respondent was a passenger and KCQ 607Q in which a head on collusion occurred leading to the respondent sustaining injuries. The respondent pleaded negligence on the part of the appellant while on the other hand the appellant denied the allegations of negligence attributed to it and shifted the blame on the respondent. However, no trial took place after the parties recorded a consent on liability in the ratio of 85% to 15% in favour of the respondent. Parties also agreed to admit all supporting documentation including the 2nd medical report by the appellant without calling the makers and that parties were to file submissions on quantum.

6. In support of his case the Respondent filed the following documents;

a) An incomplete P3 form.

b) Police Abstract.

c) Machakos hospital medical report.

d) Motor vehicle copy of records dated 29.03.2019.

e) St. Mary's mission hospital Discharge summary.

f) Demand letter dated 5.4.2019.

g) Vital Ray scan report dated 23.03.2018.

h) NTSA Search invoice of Kshs. 550.

i) St. Mary's mission hospital receipts dated 28.3.2018.

7. In proof of his injuries, the Respondent filed a medical report that is undated and has not been signed, Vital Ray scan report dated 23.03.2018 which states that there are comminuted fractures of the right acetabulum.

8. The Appellant denied the claim and in support of his case filed the following documents;

a. Driver's license.

b. Police abstract.

c. 2nd medical report by Dr. Wambugu.

9. The 2nd medical report filed by the appellant indicated that the general condition of the respondent is good and is essentially normal and that he has a healed scar lateral aspect of the thigh proximal. It also indicated that his joints movements are within normal range but elicit mild tenderness at the extreme. The doctor also confirmed that the Respondent sustained soft tissue injuries and is predisposed to early onset of osteoarthritis changes to the right hip joint.

10. I have looked at the record of appeal and given due consideration to the submissions filed and find the following issues arise for determination;

a) Whether the pleadings have been properly filed.

b) Whether the quantum of damages should be tampered with.

c) Whether the Respondent is entitled to future medical expenses.

11. As regards the first issue, it is noted that there are no prayers sought in the Memorandum of Appeal. The Appellant only states that he is appealing against the whole judgement and leaves it to the court to infer what orders it wants.

12. ***In the case of Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR*** where the Court of Appeal held:

> ***'This appeal raises two important issues. The first relates to the jurisdiction of this Court as to whether the court has powers to grant an order not specifically pleaded in the plaint, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders…In the plaint, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary.'***

13. In another case of **Mohamed Abdikadir Mohammed vs. Sammy Kagiri & another [2016] eKLR**, it was held that: -

> ***'…Thus, the trial magistrate erred in his decision to dismiss the suit on the basis of un-pleaded issue-limitation. This is not a case where the thinking in the case of Odd Jobs vs. Mubia (1970) EA 476 would apply. The exception to the general rule which allows the court to determine a case on an issue that is not pleaded, will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice.***

14. In the Court of Appeal case of **Joseph Amisi Omukanda vs. Independent Elections & Boundaries Commission & 2 Others [2014] eKLR,** it was held as follows:

> ***"There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an un-pleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See Odd Jobs vs. Mubia (1970) EA 476)."***

15. As a consequence, and guided by the **Joseph Amisi Omukanda** case, I will delve into the issues that I have deduced from the grounds of appeal as It is from the grounds of appeal and the submissions of parties that this court is able to pick up issues to be canvassed in the appeal. Even though I have taken that route I find that It would be prudent for parties to always indicate prayers in their pleadings. From the Memorandum of appeal, it can be discerned that the appellant has taken issue with the trial court's assessment of the quantum of damages as well as quantum of future medical expenses.

16. As regards the second issue, and this being a first appeal there are parameters upon which this court can interfere with the finding of the trial court. In the case of **Butt V Khan (1981)KLR, 349** the court held as follows:-

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

17. In the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR,** the Court of Appeal held that –

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.***

18. The trial court in arriving at its decision in the award of KShs. 1,000,000 as general damages relied on the case of **Fred Ogada Azere and Another Vs Ezekiel Kiarie Nganga (2019) eKLR** where the Respondent had been awarded KShs. 1,350,000. The Appellant urges the

court to reduce the award to KShs. 400,000 while the Respondent would want the award maintained as per the judgement.

19. It has been said before that the assessment of damages is a matter of discretion; and that an appellate court will hardly disturb an award unless sufficient cause is shown.

20. The Court of Appeal stated in ***Mbaka Nguru and Another v James George Rakwar*** **NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that:

> ***The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions*.**

21. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

> ***"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."***

22. In the case of **Geoffrey Maraka Kimchong vs Frechiach Hugiri (2020) eKLR** cited by the Respondent, the court relied on the following decisions in arriving at an award of 1,000,000. The court stated that;

> "I have endeavored to look for more recent comparable awards and found instructive the following two authorities:
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> **[a]** In **Cold Car Hire Tours Limited vs. Elizabeth Wambui Matheri** [2015] eKLR wherein the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the lower court award of **Kshs. 1,400,000/=** as general damages was upheld by the High Court on appeal in a decision delivered on **11 February 2015**.
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> **[b]** Similarly, in **Kennedy Ouma Dachi vs. Joseph Maina Kamau & Another** [2018] eKLR an award of **Kshs. 1,000,000/=** was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to **Kshs. 1,400,000/=** on the grounds that:
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> **"A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility… the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis."**

23. In this case, there is a consensus on the injuries sustained by the Respondent. The cases cited refer to situations in which the victims had suffered very serious injuries to the level of having their hips replaced. The Respondent has a fracture on the right acetabulum and that according to the report by Dr. Mutunga the metal implants will have to be removed at a cost of about Kshs 150,000/ while according to Dr. Wambugu who conducted a second medical report on the respondent is of the view that they do not have to be removed.

24. I note that the injuries sustained by the respondent is supported by the medical reports filed. The respondent sustained a fracture of the right acetabulum, bruises on right leg as well as blunt injuries on right hip. According to Dr. Mutunga, the respondent was prone to early onset of osteoarthritis and would require to remove the metal implants at a cost of Kshs 150,000/. On the other hand, Dr. Wambugu was of the view that the respondent walked with right sided limping gait though unaided and he formed the opinion that the fracture had united that the metal implants need not be removed. He also agreed with Dr. Mutunga's view that the injuries predisposed the respondent to early onset of osteoarthritis. Looking at the authorities cited by the parties both in the lower court and in this appeal, the case of **Fred Ogada Azere & Another V Ezekiel Kiarie Nganga (2019) eKLR** stands out as one with comparable injuries as those of the respondent. In that case the victim had sustained a comminuted fracture of the right acetabulum, posterior dislocation of right hip joint, lacerations on the left ear and the left eyelid, mild head injury, lacerations on right knee and leg as well as bruises on right hand. In the said case an award by the trial court of Kshs 1,800,000/ was reduced to Kshs 1,350,000/ on appeal. I find the respondent's injuries to be almost similar to those sustained by the plaintiff in the quoted authority. It is instructive to note that the respondent's injuries will give rise to osteoarthritis. In the premises I find the award by the learned trial magistrate was neither excessive nor out of the range awardable for such injuries. The ground of appeal on that aspect must fail.

25. As regards the third issue, it is noted that future medical expenses fall under special damages and must thus be specifically proven.

26. The **Court of Appeal in Capital Fish Limited Vs The Kenya Power and Lighting Company Limited (2016) eKLR** while relying on the case of **Provincial Insurance Company East Africa Limited vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)** held that;

> **"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.**

27. In the case of **David Bagine v Martin Bundi (283 of 1996) [1997] eKLR,** the Court of Appeal, referred to the judgement by Lord Goddard CJ in **Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177),** and again observed that:

> ***"It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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."***

28. In the case of **Zacharia Waweru Thumbi –Vs- Samuel Njoroge Thuku (2006)** the court in declining to grant future medical expenses stated that;

> ***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]***
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> ***On the basis of the foregoing authorities and reasons, I hold that the Learned Magistrate was right in not awarding the claim for future medical costs. The claim was made – pleaded – as per the Amended Plaint filed in Court on 12/11/02. But the claim was not proved. What was mentioned – the figure of K.Shs.100,000/-; - was purely guesswork by the Medical Doctor which may or may not be the exact figure at the time, and point of expenditure, when that future time comes.***

29. It is noted that the medical reports presented by the Respondent and the appellant were not subjected to tests as the makers were not called to testify. It was the agreement by the parties that the said documents be adopted as part of the evidence. Since liability had been agreed upon, then the role of the court was to assess the quantum of damages to be awarded. The quantum of future medical expenses is contested by the appellant. Indeed, the appellant's doctor had opined that there was no need for the removal of metal implants. The trial court in awarding the future medical expenses was of the opinion that the Respondent should be allowed to take off the implants whenever he needs to.

30. The Court of Appeal in **HAHN V. SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P.717, and 721** per – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

> ***"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."***

31. The respondent vide his plaint dated 23.04.2019 pleaded for future medical expenses of Kshs 150,000/. The said claim was backed by the medical report of Dr Mutunga which was produced by consent without calling the maker. As the parties agreed to admit the documents into evidence without the need for oral evidence, then it can only be deemed that they did not intent to have the documents challenged. I find the medical report capturing the future medical expenses of Kshs 150,000/ was sufficient proof that the same was specifically proved by the respondent and ought to be allowed. I am not convinced by the appellant's doctor Wambugu's suggestion that there is no need for removal of metal implants as the same is not medically sound for the simple reason that a patient may wish to have them removed even if in situ if they make him or her uncomfortable. The award of the said sum by the trial court was quite proper and I see no reason to disturb the same.

32. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF MARCH, 2021.

D. K. Kemei

Judge