REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 463 OF 2017

KAMAU PAUL.....1ST APPELLANT

ISACK GAKUNJU MUTHONI .....2ND APPELLANT

-VERSUS-

LYDIA MURINGE WAIKWA .....RESPONDENT

(Being an appeal from the Judgment of Mmasi, SPM delivered on 18th August, 2017 in Nairobi Milimani CMCC No. 2236 of 2011.)

JUDGMENT

1. This appeal emanates from the judgment delivered on 18th August 2017 in **Milimani CMCC No. 2236 OF 2011**. The suit was commenced by a plaint filed by **Lydia Muringa Waikwa**, the plaintiff in the lower court (hereafter the Respondent) against Kamau **Paul** and **Isack Gakunju Muthoni**, the defendants in the lower court (the 1st and 2nd Appellants herein). The claim was for damages in respect of injuries allegedly sustained on 30th January, 2011, when the Respondent averred to have been knocked down by the 1st Appellant's motor vehicle registration number **KBM 467J** and driven by the 2nd Appellant**,** while she was lawfully standing on the pavement along **Jogoo Road**, Nairobi. The Respondent averred that the 2nd Appellant so negligently drove motor vehicle KBM 467J that it knocked her down, and that the 1st Appellant was vicariously liable for the accident.

2. The Appellants filed a statement of defence dated 20th March, 2015 in which they denied liability and attributed negligence to the Respondent. On 31st October, 2016 parties hereto recorded a consent apportioning liability in the ratio of 75:25 in favour of the Respondent as against the Appellants. The matter subsequently proceeded for assessment of damages on 29th May, 2017. Only the Respondent gave evidence.

3. In her judgment dated 18th August, 2017 the learned trial Magistrate awarded damages as follows: -

a. General damages for pain and suffering -Shs. 800,000/-.

b. future medical expenses -Shs. 200,000/-.

c. special damages -Shs. 6890/-.

Total Shs. 1,006890/-

Less the agreed liability ratio erroneously stated in the judgment to be 65:35 in the Respondent's favour.

Net - Kshs. 654,479/-.

4. The judgment was subsequently reviewed to reflect the accurate liability ratio of 75:25 as per the consent order recorded on 31st October, 2016 Aggrieved with the judgment, the Appellants preferred the present appeal on the following four (4) grounds in the memorandum of appeal dated 30th August, 2017: -

1. "**The trial Magistrate erred in fact and law in the way she weighed the medical evidence tendered before her.**

2. The learned trial Magistrate erred in fact and law by failing to give due regard to the latest medical report that portrayed considerable recovery of the respondent injuries and minimal permanent incapacity.

3. The learned trial Magistrate erred in fact and in law by making an award that was too high and excessive in the circumstance.

4. The Learned trial Magistrate erred in fact and in law by making an award that amounted to a completely wrong estimate."

5. The appeal was canvassed by way of written submissions. As a preamble to the submissions by the Appellants, cited the decision of the Court of Appeal in **Kemfro Africa Limited t/a Meru Services Gathogo Kanini v A.M Lubia & Olive Lubia (1982-1988) 1 KAR 727** concerning the principles to be observed by an appellate court in deciding whether it is justified to disturb an award of damages by the trial court. Counsel contended that the trial court erred by failing to give due regard to the Appellants' medical report prepared by **Dr. Wambugu,** which indicated considerable recovery by the Respondent from her injuries and minimal permanent incapacity. Citing the decisions in **Gogni Rajope Construction Company Ltd v Francis Ojuokolewe [2015] eKLR** and **David Mutua & Another v Dorcas Wayua Musyoka [2015] eKLR** counsel argued that, given the nature of injuries sustained by the Respondent, the award on general damages was so high as to be an erroneous estimate and should to be disturbed. He urged that it be reviewed downwards to an award of Kshs. 150,000/.

6. Further, relying on **Tracom Limited & Another v Hassan Mohamed Adan [2009] eKLR** it was submitted that parties are bound by their pleadings; that the Respondent had not included a claim for future medical expenses in her plaint, and as such the award made under that head ought to be set aside. Finally, counsel took the position that pursuant to dicta in **South Nyanza Sugar Co. Ltd v Caleb Onyambu [2010] eKLR**, **South Nyanza Sugar Co. Ltd v Daniel Obra Nyandoro [2010] eKLR** and **Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & Another [2018] eKLR** the Appellants' failure to file a certified copy of the decree, as defined in section 2 of the Civil Procedure Act , with the record of appeal as required under Order 42 Rule 13 (4)(f) of the Civil Procedure Rules was curable under Article 159 (2)(d) of the Constitution; that the objection thereon was raised at the eleventh hour by the Respondent; and that the Appellants would be unduly prejudiced if the court were to sustain the objection. The court was urged to allow the appeal.

7. Taking up the objection, counsel for the Respondent, while citing the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules and the decisions in **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR, Chege v Suleiman [1988] eKLR** and **Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others [2016] eKLR** submitted that failure to include a certified copy of the decree in the record of appeal was fatal as it rendered the entire appeal incomplete, incompetent and liable to be struck out. Concerning the substantive appeal, counsel awards in the lower court and relied on the dicta in **Butt v Khan (1981) KLR 349.** He asserted that the Appellants have not demonstrated that the trial court proceeded on wrong principles or misapprehended the evidence thus arriving at an entirely erroneous estimate on damages.

8. Further citing the case of Southern **Engineering Company Ltd v Mutia [1985] eKLR** as to discretion of the court in awarding damages, counsel submitted the trial court's award on damages of Kshs. 800,000/- was reasonable. He relied on the decisions in **Bildad Onditi & Another v Belinda Atieno Onyuka [2013] eKLR** and **Charles Nzioka Muthoka v Attorney General & Another [2014] eKLR** among others. Defending the award of future medical expenses, counsel cited the case of **Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission & 2 Others [2014] eKLR** to assert that the Appellants were not ambushed by the claim for future medical expenses which were documented in the Respondent's medical report.

9. The court has considered the evidence and submissions at the trial and the submissions made by the respective parties on this appeal. That duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EA 1.** The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"

10. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed by the Appellants as inordinately high or unjustified. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30.** It was held in that case that:

"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that 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 damages." see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) e KLR.**

11. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that:

"An appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".

12. The sentiments of the English Court in **Lim Poh Choo v Health Authority (1978)1 ALL ER 332** were echoed by **Potter JA** in **Tayab v Kinany (1983) KLR14,** quoting dicta by **Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326,** at page 345 as follows:

> **"But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional." (**Emphasis added**).**

13. Before proceeding to consider the substantive matters raised in this appeal, it is necessary to address the objection raised by the Respondent concerning non-compliance by the Appellants with the requirements of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules. Order 42 Rule 13(4) of the Civil Procedure Rules provides that:-

> **"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:**
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> **(a) the memorandum of appeal;**
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> **(b) the pleadings;**
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> **(c) the notes of the trial magistrate made at the hearing;**
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> **(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
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> **(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
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> **(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**
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> **Provided that—**
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> **(i) a translation into English shall be provided of any document not in that language;**
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> **(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)".**

14. The court having perused the Record of Appeal notes that indeed no copy of the certified decree of the decision appealed from was included. However, the record contains certified copies of the proceedings and judgment of the lower court. Furthermore, the record of proceedings before this court indicates that the appeal was certified ready for hearing and directions taken without the Respondent raising any objection as to the contents of the Record of Appeal. The objection ought to have been raised at the time of taking directions under Order 42 Rule (1).

15. The Respondent's contention on this appeal is that there is no competent appeal before the Court. That is a matter that touches on the jurisdiction of the court and ought to have been raised at the time of directions pursuant to the provisions of Order 42 Rule 13 (2). It is my view however that in this case, the inclusion of the copy of the judgment of the lower court satisfies the requirements of sub-rule 4 (f) of Rule 13 of Order 42 of the Civil Procedure Rules, and that the Judge who certified the appeal ready for hearing in the presence of the respective counsel and gave directions on 15.07.2020 was so satisfied. See also the definition of decree in section 2 of the Civil Procedure Act and the proviso thereto which inter alia states that *" for the purposes of appeal, , "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up*.". It is too late in the day for the Respondent to raise the objection which is hereby rejected.

16. On the substance of the appeal, there is no dispute due to the accident, the Respondent sustained a fracture of the left radius with displacement, loss of two lower incisor teeth, broken upper central and left lateral incisor teeth, cut wound to the lips and blunt trauma to the chest. These injuries are documented in the Respondent's medical report by **Dr. Theophilus Wangata** (**P**. **Exh. 5(a)**) and confirmed by the Appellants' medical report by **Dr. Wambugu P. M** tendered by consent as **P**. **Exh. 10.**

17. At the trial, the Respondent testified that she was treated at Kenyatta National Hospital for her injuries. She produced treatment notes from the said hospital as **P. Exh. 3**. Dr. Theophilus Wangata's prognosis was that the Respondent's wrist fracture predisposed her to developing carpal tunnel syndrome (wrist pain due to compression of median nerve) and would require surgery to free the compressed median nerve as well as physiotherapy at a cost estimated at Kshs. 150,000/-. That she would also require replacement the two lower missing teeth and repair of two upper broken teeth at an estimated cost of Kshs. 80,000/-. He assessed permanent functional incapacity at 45%.

18. The Appellant's medical report by Dr. Wambugu, a consultant surgeon – **P. Exh. 10** was prepared four (4) years after the accident. He opined the Respondent's injuries, being the two lost teeth may be bridged using prosthesis at an estimated costs of Kshs. 10,000/- each at Kenyatta National Hospital, further the broken teeth maybe crowned at an estimated cost of Kshs. 16,000/- all-inclusive at Kenyatta National Hospital. In conclusion the doctor opined that there was no sign of carpal tunnel syndrome and assessed functional permanent incapacity at

4%.

19. In her judgment, the trial magistrate observed that;

> **"The upshot of the foregoing is that the plaintiff sustained severe injuries. I herewith enter judgment for the plaintiff as against both defendants jointly and severally at the agreed liability ration of 75:25 per cent in favour of the plaintiff as against the defendants in the sum of Kshs. 800,000/- (Eight Hundred Thousand shillings) as general damages for pain suffering and loss of amenities and Kshs. 6,890/- (Six thousand Eight Hundred and Ninety Thousand Shillings only) as special damages.**
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> **In regard to future medical expenses, both doctors in their respective medical reports agreed that the plaintiff will require future dental surgery to replace the missing and repair the broken teeth. Dr. Wangata proposed an all-inclusive amount of Kshs. 200,000/-.**
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> **Dr. Wambugu proposed an all-inclusive amount of Kshs. 36,000/- for future costs at Kenyatta National Hospital. For future cost the court will award Kshs. 200,000/- (Two Hundred Thousand Shillings Only)".**

20. Although the trial court adverted to the submissions made and asserted to have also considered the authorities by the parties, no thorough discussion preceded the award of damages and future medical expenses. It is a truism that it is next to impossible to find authorities whose exact injuries and sequela to match this or any other case. The Respondent had urged an award of general damages in the sum of Kshs. 1,300,000/- relying on **Joseph Musee Mua v Julius Mbogo Mugi [2013] eKLR.** On this appeal however**,** counsel included two other cases that were not cited at the trial stage. That is unacceptable. This Court entirely agrees with **Ochieng J** in his judgment in **Silas Tiren & Another V. Simon Ombati Omiambo [2014] eKLR** wherein the learned Judge took exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> **"None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court … it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court… The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."**

21. Going back to the decision in **Joseph Musee Mua v Julius Mbogo Mugi [2013] eKLR** relied on by the Respondent, the injuries therein are rather severe, in that the claimant sustained serious fractures to the left tibia and fibula, was unconscious for two (2) days and underwent several surgical procedures while admitted in hospital for more than two months. The injuries barely compare with those suffered by the Respondent herein and attendant sequela. As for the Appellants' authorities, namely, **Gogni Rajope Construction Company Ltd v Francis Ojuokolewe [2015] eKLR** and **David Mutua & Another v Dorcas Wayua Musyoka [2015] eKLR** these reflect severe and multiple fractures, albeit involving fracture to the arm bones (shoulder and wrist). The awards in respect of general damages were Shs.800,000/- and Shs. 300,000/- respectively, in 2015. Significantly, in the former case the plaintiff had sustained five fractures while in the latter the plaintiff suffered three fractures. Some guidance may be drawn therefrom, subject to these caveats. That notwithstanding, this court is of the view that an award of Shs. 150,000/- as urged by the Appellants in this case would be too low. Similarly, the award of Kshs. 800,000/- by the trial court and supported by the Respondent, is on the higher side.

22. The most severe injury to the Respondent herein was the wrist fracture, and by 2015, the Respondent had not developed carpal tunnel as anticipated by Dr. Wangata in May 2011. Dr Wambugu upon examining her in May 2015 stated that the fracture had healed without deformity albeit with slight risk of osteoarthritis and he assessed permanent disability at 4% compared to Dr Wangata's 45%. No doubt the latter opinion was influenced by the anticipation that the Respondent would likely suffer carpal tunnel syndrome. Regarding healing and sequela, the latest report appears more accurate, to my mind. The Respondent lost two teeth while two were broken, with attendant lip injury. There were also soft tissue chest injuries that resolved without event. Apparently, the trial court paid scant attention to the contents of the Appellants' medical report, while accepting the Respondent's medical report. The Appellants' complaints in that regard appear justified. Reviewing all the relevant evidence on the Respondent's injuries, pain and suffering and possibly minimal permanent incapacity, the court is persuaded that the award on general damages was too high and ought to be disturbed. The court will therefore review the award downwards to a sum of Shs. 500,000/- (Five Hundred Thousand) subject to the liability ratio of 75:25 agreed upon by the parties.

23. The award of future medical expenses of Kshs. 200,000/- by the trial court, was erroneous as no such sums had been pleaded. It is no answer for the Respondent to assert that the award was not an ambush as it was contained in the Respondent's medical report. The law requires that the defendant be given notice of any claim for future medical expenses through the plaintiff's pleadings, and not otherwise. As has been held in many authorities, parties are bound by their pleadings and future medical expenses must be pleaded. See the Court of Appeal decision in **Kenya Bus Services Ltd. v Gituma (2004) 1 E.A 91.** In the circumstances, the award of future medical expenses by the trial court was without basis and erroneous. The same must be set aside in toto.

24. The appeal has therefore succeeded in part. The award of general damages for pain and suffering in the lower court is set aside and the court substitutes therefor an award of Shs.500,000/- (Five Hundred Thousand), subject to the agreed liability ratio, while the award for future medical expenses is set aside. Accordingly, the judgment of the lower Court is varied in these terms. As the appeal has succeeded partially, the respective parties will bear their own costs in the lower court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 4TH DAY OF NOVEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Mr Gitari h/b for Mr Mbigi for the Appellants

Mr Ngethe h/b For Mr Mwaniki for the Respondent

C/A: Carol