REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 39 OF 2019

(CORAM: R. E. ABURILI - J.)

PITALIS OPIYO AGER.....APPELLANT

VERSUS

DANIEL OTIENO OWINO.....1ST RESPONDENT

EZEKIEL OTIENO OTIENO.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Hon. E.N. Wasike, (Senior Resident Magistrate at Bondo delivered on 21st February 2019 in Bondo Civil Suit No 146 of 2015)

JUDGMENT VIA PHONECALL

1. This appeal arises from the judgment and decree of Hon. E.N. Wasike, Senior Resident Magistrate, in **Bondo PM's court Civil Suit No. 146 of 2015**. The impugned judgment was delivered on 21/2/2019.

2. The appellant herein **Pitalis Opiyo Ager** was the Plaintiff in the lower court whereas the Respondents Daniel Otieno and Ezekiel Otieno Owino were the defendants.

3. The plaintiff by his Plaint dated 25th November 2015 sued the Defendants claiming for special damages of Kshs. 6,655 and general damages together with costs of the suit and interest. The suit was founded on an alleged road traffic accident which occurred on 10/9/2015 along Bondo-Usenge road when the plaintiff while travelling as a passenger aboard Motor vehicle registration number KBK 593S, Toyota Matatu, Registration No. KAL 366D approaching from the opposite direction collided with the motor vehicle registration No. KBK 593S thereby seriously injuring the plaintiff.

4. The Plaintiff blamed the Defendants for the accident and set out particulars of negligence attributable to the agent and driver of Motor Vehicle Registration No. KAL 366D. The Plaintiff also enumerated the particulars of injuries he sustained following the said accident. As a result of the said accident and injuries, the plaintiff claimed that he suffered loss and damage.

5. The defendants, now Respondents filed defence dated 15th January 2016 denying the plaintiff/claim and urging the court to dismiss the plaintiff's claim with costs.

6. The defendants also attributed the occurrence of the pleaded accident to the negligence of the driver of motor vehicle No. KBK 593S and also blamed the Plaintiff for contributing to the occurrence of the said accident, by setting out particulars of negligence against the plaintiff.

7. The plaintiff filed a reply to defence dated 8th February 2016 joining issues with the defendants and denying particulars of contributory negligence attributed to the driver of motor vehicle KBK 593S and to the alleged contributory negligence by the Plaintiff.

8. The parties' advocates recorded a consent which was adopted by the court on 2/11/2017, entering judgment on liability and apportioning liability at 80% against the defendants and 20% against the plaintiff. The court was therefore left to determine the quantum of damages payable to the plaintiff applicant herein. By a judgment dated 21/2/2019, the learned trial Magistrate awarded to the plaintiff damages as follows: -

General damages, ***Kshs. 200,000/=***

Proven specials ***Kshs. 2,000/=***

Total ***Kshs. 202,000/=***

Less 20% liability ***Kshs. 40,400/=***

Grand Total ***Kshs. 161,600/=***

Together with the costs of the suit.

9. Aggrieved by the above judgment and decree, the plaintiff now appellant filed this appeal vide Memorandum of Appeal dated 25th September 2019 setting out the following grounds of appeal:

> ***1) That the learned trial Magistrate erred in law and in principles in failing to correctly appreciate the plaintiff's injuries and misapprehending the same and thus awarding general damages which are too little in the circumstances.***
>
> ***2) That the learned trial Magistrate erred in law and principle failing to award general damages commensurate to the injuries sustained by the appellant.***
>
> ***3) The learned trial Magistrate erred in law and principles in failing to appreciate the medical evidence adduced in the trial.***
>
> ***4) The learned trial Magistrate erred in principle in delivering the above named judgment contrary to the principles as established by precedent.***

10. The appellant urged the court to set aside the judgment on quantum and make its own findings based on the pleadings, evidence on record and submissions of parties.

11. This appeal was filed out of time with leave of the court granted by consent of both parties dated 29/4/2019 and adopted as the order of the court on 25/9/2019 which consent also granted leave to the Respondents herein to file a cross appeal. However, as at the time of writing this judgment, I have not seen any cross appeal filed in this matter by the Respondents who are the appellants in ***HCCA 26 of 2019***.

12. The appeal is therefore against quantum only. This being a first appeal, this court is obliged by the stipulation in **Section 78 of the Civil Procedure Act**, to reassess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. This legal principal was pronounced in the case of **Sielle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang, it was held:

> ***"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

13. Appraising the evidence before the trial court on quantum, the appellant who was the plaintiff testified as PW1 and called 2 other witnesses to support his case on the injuries that he sustained following the undisputed accident. The appellant **Pitalis Opiyo Ager** testified that he sustained the following injuries:

> ***a) a cut on the head.***
>
> ***b) Dislocation on the neck (stiff neck).***
>
> ***c) injuries on the shoulder***
>
> ***d) injuries on the left arm***
>
> ***e) chest injuries***
>
> ***f) Injuries on the small toe of the left leg (dislocation).***

14. He stated that was treated at Bondo District Hospital as an outpatient but later transferred to Siaya County Referral Hospital. That he later went to see Dr. Prof Okombo in his clinic for medical examination and paid Kshs. 500/= and also paid, Kshs. 1,500/= for the Medical Report. That he was also issued with a P3 form by the police and he took it to Kisumu to be filled by Dr. Onyimbi and he paid Kshs. 500/=. He produced the bundle of receipts as exhibits and also produced photocopies of receipts for medical expenses. The plaintiff further testified that he had not fully healed as he had neck pains and that he still experienced chest pains as well as back pains.

15. In cross examination, the appellant stated ***that he only sustained a dislocation not a fracture.*** He stated that he had been buying drugs as he had not fully healed but he had no receipts to show for it. He stated that he was aged 80 years and that due to financial constraints, he could not afford to go for further medication.

16. PW2 Professor Were Okombo testified that he was a physician. He confirmed examining PW1 on 20/1/2016 with a history of having

been involved in a road traffic accident, and sustaining the injuries which the doctor stated were:

- ***chest injuries;***
- ***head injuries;***
- ***neck injuries with dislocation of the neck cervical bone;***
- ***dislocation of the left elbow joint;***
- ***chest injuries, injuries on the left scapula bone with a fracture;***
- ***injuries on the left shoulder joint with dislocation;***
- ***multiple bruises on the right hand;***
- ***bruises on the left upper limb; and***
- ***dislocation of the right toe.***

17. The Doctor further testified that at the time of examination, the patient had not healed fully and complained of pain on the neck, head, shoulder, chest and knee. He stated that at the time of examination, the plaintiff's general condition was said to be good. That locally, the appellant patient he had tenderness on the chest, neck, left shoulder, right and right toe. That he also had a scar on the scalp, *and that X-rays revealed fracture of the left scapula bone and dislocation of the right toe*. The doctor classified the injuries as soft and bone tissue. He recommended further treatment. He stated that during examination, he referred to the victim's personal history, treatment documents to where he was treated, own physical examination and Xrays. He produced the medical report as exhibit 3.

18. On cross examination by the Defence counsel, PW2 stated that a request for Xray for the left elbow joint was made and a report for Xray for shoulder bone was also made. He stated that he saw Xrays although the same had not been produced in court as exhibits and that the Xrays confirm fractures. Further, he stated that although MFI 2C dated 10/7/2015 showed that the patient was aged 42 years, the doctor assessed his age to be 53 years. He also stated that there was a mention of head injury but no mention of dislocation of the cervical bone and no multiple bruises in the treatment chits.

19. In re-examination, the doctor stated that there was a dislocation of the cervical bone but the same was not captured in the treatment notes.

20. **PW3 Kennedy Opiyo Omondi** a clinical officer, then working at Bondo Hospital testified and produced medical documents for Pitalis Opiyo dated 10/7/2015 saying that the same were authored by Harun Chebon who had since gone on transfer. The said documents were produced as P exhibits 2a, b, c, d.

21. In cross examination, PW3 stated that he had worked at the Bondo District Hospital from 2013-2014 and was still working at the said Hospital. He stated that Harun did not see head injury. Further, that one required an MRI or CT scan to see a dislocation of the spine. Further, that Harun, the Clinical Officer who examined the plaintiff did not see a blunt chest injury. Further, that there was no fracture of the left scapula and neither did he note bruises on he left upper limbs or a dislocated right toe, but that a skull Xray was conducted. That on the right elbow, the patient sustained soft tissue injuries. He stated that the report indicates normal for Xray of shoulder joint but that there was no Xray requests for the right toe, scapula and spine. Finally, the witness stated that the treatment plan was missing.

22. In re-examination, the witness stated that the clinical summary states that there was depressed fracture of the scapula.

23. At the close of the plaintiff's case, the defendants also closed their case without calling any witness or adducing any evidence and parties filed written submissions.

24. The plaintiff's counsel submitted relying on the pleadings, the testimonies by the plaintiff and his two witnesses and the exhibits produced on the injuries allegedly sustained by the plaintiff and urged the court to award his client Kshs. 400,000/= general damages for pain, suffering and loss of amenities as well as specials of Kshs. 2,000/= together with costs and interest.

25. On the part of defendant, it was submitted that the findings by the doctor were not based on sound clinical examination as the doctor was not able to explain the inconsistencies in the medical report vis a vis the treatment notes. The defendant/Respondent therefore contended in submission that there was no conclusive evidence before the trial court with regard to the injuries sustained and therefore counsel urged the court to dismiss the suit on quantum.

26. In the alternative, the defendants'/Respondents' counsel urged the trial court to rely on the inpatient/outpatient continuation sheet and the injuries indicated therein and award Kshs. 40,000/= general damages less contribution of 20% . Reliance was placed on ***HCCA 62 and 63 of 2015 Gabriel Owe Okello V Ujenzi Quarries Limited (Consolidated)***. On special damages, it was submitted that there was no proof of the same hence the plaintiff was not entitled to the same.

27. In support of this appeal, the appellant's counsel filed written submissions dated 18th December 2019 attacking the award of Kshs. 200,000/= general damages by the trial court and asserting that in doing so, the trial court did not take into account the serious injuries

suffered by the appellant and the applicable principles in awarding of general damages. In the view of the appellant, the award was inordinately low.

28. Several decisions were relied on to support the above propositions namely: ***Loice Wanjiku Kagunda V Julius Gachau Mwangi, CA 142 of 2003*** by the Court of Appeal; ***Kemfro Africa Ltd T/A Meru Express Service & Another Vs A.M. Lubia and Olive Lubia (1982-88) 1 KAR 727*** P.730; ***Gicheru Vs Morton & Another (2005) 2 KLR 333 Major General Peter M. Kariuki V Attorney General CA 79/2012***; among others, and a submission made that Kshs, 200,00/= awarded to the appellant by the trial court was inordinately low because the appellant had suffered serious injuries and that he had not fully recovered from the accident.

29. Relying on ***Jaldesa DIBA T/A DIKUS Transporters & Another Vs Joseph Mbithi Isika [2013]eKLR*** and ***Beatrice Khamede V Erick Wanunu & Another[2019]eKLR,*** the appellant's counsel urged this court to award the appellant Kshs. 500,000/= general damages as reasonable compensation.

30. Counsel for the appellant therefore urged this court to set aside the judgement of the trial court on quantum and substitute it with the newly proposed award of Kshs. 500,000/= together with costs and interest.

31. As stated earlier, the Respondents never filed away written submissions in this appeal, despite being granted leave to do so on 21/1/2020.

DETERMINATION

32. I have carefully considered the appellant's appeal, the evidence adduced before the trial court, the exhibits produced therein, the submissions in support of this appeal and the authorities relied on by the appellant's counsel.

33. In my humble view, the main issue for determination in this appeal is whether the trial court awarded damages that were inordinately low as to warrant interference by this court.

34. This being an appeal against quantum only, this court will only interfere with an award of damages in circumstances as set out by the Court of Appeal in ***Bashir Ahmed Bhutt V Uwais Ahmed Khan [1982-1988] KAR 5*** where it was stated:

> ***"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….."***

35. In the appellant's plaint, it was pleaded that the appellant sustained the following injuries following the material accident:

- ***fracture of the left scapula.***
- ***head injury with fracture of the skull.***
- ***dislocated right toe.***
- ***dislocation of the right should joint.***
- ***Dislocated certificate spine of the neck.***
- ***Dislocation of the left elbow joint with swelling.***
- ***Cut wound on the head (right parietal region of the scalp)***
- ***multiple bruises on the right hand.***
- ***Blunt chest injury.***
- ***bruises on the left upper limb.***

36. The above injuries are contained in the medical report dated 20/1/2016 prepared by Prof. Dr. L.W. Okombo, a physician who examined the appellant about six months after the accident. In his evidence before the trial court and taken on oath, the appellant testified that he sustained injuries involving:

- ***a cut on the head;***
- ***dislocation on the neck (stiff neck);***
- ***injuries on the left shoulder;***
- ***Injuries on the left ar;.***

- ***Chest injuries; and***

- ***Injuries on the small toe of the left leg (dislocation).***

37. The appellant also testified that he was initially treated as an outpatient then transferred to Siaya County Referral Hospital. In support of the pleaded injuries, the appellant called the Doctor Prof Okombo who examined him and a clinical officer who produced initial treatment notes as exhibits on behalf of the maker thereof Harun Chebon who was said to have been transferred.

38. The appellant also produced three Xray and ultra sound ***Request Forms***. In the initial treatment notes dated 10/7/2015, the appellant was recorded to have sustained multiple bodily injuries involving: -

- ***swelling on the head.***

- ***swollen tender left elbow.***

- ***swollen tender left should joint.***

- ***inability to (sic) the limb - dislocated left elbow joint.***

- ***cut wound right parietal region of the scalp.***

- ***multiple bruises right metatarsals.***

39. At the backside of the said treatment notes, it was noted that the appellant was to receive treatment involving drugs and Xray of left elbow joint.

40. The appellant also produced Xray/ultra sound ***Request Form*** for the left shoulder joint with a report underneath signed on 16/7/2015 stating dislocation of the left shoulder joint. The second Xray Request Form is dated 31/7/2015 for the right elbow joint and the clinical summary underneath shows he was complaining of pains in the right elbow joint. However, there is no evidence that the Xray for the right elbow joint was done. this is because there is a difference between an Xray Request form and an Xray report. The other Xray / ultra sound Request form undated was for skull Xray but there is no report connected with the alleged depressed skull fracture. In the P3 form, the appellant's injuries were assessed in the degree of grievous harm.

41. I observe that the Clinical Officer PW3 who produced the initial treatment notes for the appellant on behalf of the author thereof answered questions in cross examination at length, which answers tended to discredit the findings in the P3 form and he even stated that there was no treatment plan.

42. However, exhibit 2(a) is the initial treatment note for the appellant and it was written by the clinician who first received and attended to the appellant as a patient. At the backside of it is the Treatment Plan showing the medication prescribed and Xray requests which were evidenced by the Xray/ultrasound Request forms produced as exhibits.

43. Furthermore, the P3 form which was filled only 6 days after the accident and from my observation of the injuries noted therein, they match the injuries noted in exhibit 2(a), the initial treatment notes. Nonetheless, the said P3 form was never produced as an exhibit although it was marked for identification.

44. PW2 Prof. Dr. Okombo stated in his testimony that he saw Xray films of the appellant at the time of examining the appellant on 20/1/2016, but the appellant never produced the said xray films and neither did he say where they were and why he could not produce them as exhibits.

45. For the above reasons, am in agreement with the Respondent's contention that the injuries enumerated by Prof. Okombo as reproduced in the Plaint are inconsistent with the injuries sustained by the appellant as per the initial treatment notes and evidence of PW3 who produced the treatment notes as exhibits on behalf of his colleague who had since been transferred out of the hospital. In his judgment, the trial Magistrate observed that although he had referred to the listed injuries contained in the P3 form, the same P3 form had not been produced as exhibit and it was only listed as a document in the appellant's list of documents.

46. I have perused the evidence of PW1. He identified the P3 form as MFI 4(a). The said P3 form was however never produced by any witness. Accordingly, I agree with the trial court that the P3 form was never produced as an exhibit. However, even eliminating the P3 form, the initial treatment notes Ex 2(a) is clear on the initial injuries noted and the specific requests that were made for further investigations to confirm the injuries in the left scapula and the right elbow as well as Xray of the skull. There was, however, no evidence confirming those alleged fractures and or dislocation.

47. Furthermore, the clinical officer who filled the P3 form used the treatment notes to confirm some of the injuries other than the alleged fractures and dislocations.

48. Having said that, Prof Okombo in his testimony claimed that the appellant sustained injuries on the chest, neck, left shoulder, right hand and the right toe. That he had a scar on the scalp and that Xray revealed fractures of the left scapula bone and dislocated left shoulder bone and of the right toe. The question is whether these injuries as enumerated by Prof Okombo were proved to the standard required on a balance of probabilities.

49. The burden of proof lies with he who alleges. This is the stipulation in **Sections 107-109 of the Evidence Act**. The appellant complained that the trial court failed to appreciate the injuries sustained by him. However, the trial court record shows that the trial court fully appreciated and outlined all the injuries allegedly sustained by the appellant as pleaded, as per the medical report, the P3 form which was never produced as an exhibit and in the initial treatment notes produced as exhibits.

50. The trial magistrate then discredited the evidence of PW2 Prof. Dr. Okombo as being speculative especially the alleged fractures and dislocation. This is because no Xray films or MRI films were produced as exhibits to confirm the alleged fractures. The trial Magistrate however, relied on the initial treatment notes and assessed the damages payable based on the injuries reflected therein. I find no fault in the findings of the trial court.

51. The other significant question that this court must answer is whether failure to produce Xray films and MRI is fatal to the plaintiff's claims that he sustained dislocations and or fractures which Prof. Okombo described in his Medical Report.

52. The view of this court is that failure to produce Xray films or P3 form *per se* was not fatal to the appellant's case as there were treatment notes that showed some injuries suffered by the appellant. However, if the Plaintiff wanted the court to believe that he had sustained such serious injuries involving fractures and dislocation, or skull fracture, the burden of proof lay on him to produce evidence showing that indeed he had sustained those injuries, and not to merely allege, since those types of injuries could not be proven by mere observation.

53. In the initial treatment notes, there is indication that the treatment also involved referral for X-rays and albeit Prof. Okombo stated that he relied on the said treatment notes and X-ray films to establish the alleged fractures and dislocation, the stated X-ray films or reports of the requests were never produced in evidence and no reasons were advanced for non-production of the same. Prof Okombo also never stated that he saw Reports of the results of the alleged Xray films. Neither did he state that he ordered for fresh Xray films to confirm those fractures or dislocation. And in the event that such non-production of the said Xray films and reports at the trial stage was inadvertent, nothing prevented the appellant from seeking leave of this court in this appeal, for adduction of additional evidence.

54. In my humble view, it is not enough for the appellant to claim that the trial court failed to appreciate the injuries that he sustained following the undisputed accident wherein liability was even agreed upon and shared between the Plaintiff and Defendants. My humble view is that the X-ray films would have formed part and parcel of the initial treatment notes showing first hand serious injuries sustained by the Plaintiff after the accident and therefore in my humble view, failure to produce the same was fatal to the claim by the Plaintiff/Appellant that he sustained dislocations and fractures, especially where Prof Okombo does not say that he personally did xrays on the appellant and established that indeed the appellant had suffered those alleged fractures and or dislocations.

55. Accordingly, the trial Magistrate cannot be faulted for finding that the evidence by Prof. Okombo was speculative.

56. As was persuasively held in ***Eastern Produce (K) Ltd V James Kipketer Ngetich Eld HCCA No. 85/2002***, failure to produce initial treatment notes casts some doubt on the appellant's case, and was fatal to the overall outcome of the appellant's case.

57. In the instant case, albeit, initial treatment notes were produced, in the absence of any Xray or MRI images to show that the appellant had sustained the alleged dislocation and or fractures of the parts of the body mentioned by Prof Okombo in his medical report, and evidence of how the said fractures and dislocation were treated or managed, whether by application of *plaster paris* cast and removal; and when that was done, I am unable to fault the findings by the trial court that the claims that the appellant sustained dislocations and or fractures remained mere allegations that were totally unsupported.

58. Before I conclude my assessment of the evidence by Prof Okombo which the trial court found to be speculative, I must conclusively determine the question whether expert evidence by Prof Okombo is binding on a court of law as the gospel truth.

59. In my humble view, the evidence and medical report by Prof. Okombo was not supported. There was no evidence that the Plaintiff/Appellant sustained the fractures or dislocation which the Doctor in his testimony and medical report alleged the appellant suffered.

60. Albeit Prof Okombo is an expert in the medical field, on the weight that this court must attach to expert opinion, the case of ***Stephen Kinini Wangondu V The Ark Ltd [2016] eKLR*** is illustrative. The court stated:

> ***"Expert testimony like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is not obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided: it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.***
>
> ***While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criterial a court should use to weigh probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of evidence which a court has to take into account. Four consequences flow from this:***
>
> > ***"Firstly, expert evidence does not trump all other evidence. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest important. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.***

Secondly a judge must not consider expert evidence in a vacuum. It should not therefore be 'artificially separated' from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a Judge should consider all the evidence in the case, including that of experts, before making any findings of fact, even provisional ones."

61. The Court of Appeal in ***Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko CA 203/2001[2007] 1 EA 139*** held:

"like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

62. This court concurs with the above holdings of the Court of Appeal that indeed, expert evidence should not outdo or trump all other evidence, and it should not be considered in a vacuum. The expert evidence must indeed be considered or evaluated in the context of other evidence.

63. Thus, even if experts are called upon to assist the court in evaluating a complex matter, the said evidence is not binding on its own.

64. In the instant appeal, I have considered other evidence on record being that following the material accident, the appellant was treated as an outpatient and released to go home and that there is no evidence of inpatient or treatment for fractures and or dislocations that he alleges he sustained. Further, I have found that despite the initial requests for X-rays in the supposedly injured areas, no X-ray films were produced and or evidence that the said X-rays were done and what followed in the management of the alleged fractures or dislocation, after the said X-ray films if at all the Xray reports ever proved or confirmed the alleged fractures or dislocations.

65. This court observes and takes judicial notice of the fact that body parts allegedly fractured or dislocated such as the neck, elbow, head left shoulder and left elbow joints are sensitive areas. The P3 form was not produced as an exhibit even after being marked for identification. But that aside, there is no mention of any fracture, or treatment that involved *plaster paris* cast or immobilization of the neck, shoulder or elbow joints etc as a form of management of the fractured areas. No treatment plan for the alleged fractures such as plaster cast or immobilization or physiotherapy was mentioned in the treatment notes and even Prof. Okombo in his medical report only mentioned the need for an orthopaedic surgeon and physiotherapy as being for the future. He never mentioned what had been done on the fractured or dislocated sites immediately after the accident on 10/7/205 yet he was examining the patient on 20/1/2026 nearly six months later.

66. For all the above reasons, I am inclined to reject the medical report, the injuries pleaded and testimony by Prof. Dr. Okombo as being speculative.

67. I must therefore reassess the damages only on the basis of the initial treatment notes which show that the appellant sustained injuries involving:

- ***swollen tender left elbow joint.***
- ***swollen tender left shoulder joint.***
- ***cut wound on the Right parietal region of the scalp.***
- ***multiple bruises metatarsals.***

68. This is so because, even in his evidence in chief, the appellant never mentioned that he sustained any fracture or dislocation in the named injured areas. In his witness statement filed together with the plaint, the appellant stated as follows as far as the injuries were concerned:

"I was seriously injured and was rushed to Bondo Sub-District Hospital where I was treated and some X-rays done. I was later discharged but I returned for check up at the same hospital."

69. I reiterate that the appellant never testified that he sustained any fracture or dislocation. There is no single document that was produced by the appellant to show that he was attended to at Siaya County Referral Hospital after he was treated at Bondo District Hospital following the material accident.

70. For the above reasons, the question is whether I should interfere with the damages awarded by the trial court. The discretion in assessing general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages, or that it was inordinately low.

71. In assessing appropriate damages, this court, like the trial court, takes cognizance of the fact that such an exercise is not a mathematical

exercise and the court, in doing the best that it can, takes into account the nature and extent of the injuries sustained in relation to awards made by the court in similar cases.

72. In ***Denshire Muteti Wambua V KPLC Ltd [2013]eKLR*** the Court of Appeal observed that:

> ***"Further we observe that learned trial Judge failed to appreciate that in assessment of damages for personal injuries, the general method of approach is that comparable injuries should as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd Vs Bimomo & 2 Others [2004] 2 KLR 101)"***

73. In the instant appeal, the appellant was awarded Kshs. 200,000/= general damages less agreed 20% contribution, leaving Kshs. 160,000/=. However, I find that in principle, the trial court erred in subjecting proven special damages to 20% contribution. I therefore set aside the 20% contribution apportioned against special damages. I then proceed to determine whether the Kshs. 200,000/= general damages was appropriate and or sufficient compensation following the stated injuries as per initial treatment notes of the appellant and his testimony in court.

74. I observe that the trial Magistrate did not, in making the said award, refer to any authority where comparable damages were made for comparable injuries.

75. In ***Fanny Esilako V. Dorothy Muchere HCC 642/1991***, cited by the Respondents in the authority of ***Gabriel Owe Okello V Ujenzi Quarries Ltd Kisumu HCCA 62/63 of 2015***, the Court awarded Kshs. 150,000/= for cuts over the left upper arm, multiple cuts on the wrist, cuts on left knee, cuts on right arm, sprained ankle and blunt head injury with swelling.

76. The above injuries were far much more serious than the proven injuries in the instant case. However, due to inflation and time lapse since the above decision was made, I find Kshs. 200,000/= awarded by the trial court sufficient compensation for the plaintiff. I find no reason to interfere with it. I uphold it.

77. For all the above reasons, this appeal is found to be devoid of merit and is hereby dismissed.

Summary General Damages:

Kshs. 200,000/=

Less 20% Kshs. 40,000/=

Kshs. 160,000/=

Add specials Kshs. 2000/=

Kshs. 162,000/=

78. The appellant shall have costs of the suit in the lower court and interest at court rates on general damages from date of judgment in the lower court until payment in full. Interest on special damages accrues from date of filing suit until payment in full.

79. Each party to bear their own costs of this appeal.

80. Orders accordingly.

Dated, signed and Delivered at Siaya, this 6th Day of May 2020 via telephone, as read out to Mr Geoffrey Okoth counsel for the appellant with consent of Miss Nishi Pandit for the Respondents.

R.E. ABURILI

JUDGE