REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 14 OF 2017

SAMMY K. BIWOTT..APPELLANT

-VERSUS-

RICHARD ONYANGO NYANGOKA................RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Cherono, SRM, delivered on 1 February 2017 in Kapsabet PMCC No. 52 of 2010)

JUDGMENT

[1] The Respondent herein was the Plaintiff before the lower court in **Kapsabet Principal Magistrate's Civil Case No. 52 of 2010: Richard Onyango Nyangoka vs. Sammy K. Biwott**. He filed the suit claiming general and special damages, interest and costs, in respect of injuries that he allegedly sustained in a road traffic accident that occurred near **Keben Hotel** within Kapsabet Town on the **17 April 2009**. The contention of the Respondent was that he was knocked from behind by **Motor Vehicle Registration No. 47CD54K** due to the negligence of the driver of that motor vehicle, one **Edward Kiplagat Yego**; and that, as a result, he suffered dislocation of the right ankle joint as well as bruises on the right leg.

[2] The Appellant, as the Defendant before the lower court, denied the allegations of negligence as well as the alleged particulars of injury and damage. In particular, the Appellant denied being the owner of the subject motor vehicle and put the Respondent to strict proof thereof. Upon hearing the parties, the learned trial magistrate came to the conclusion that the Respondent had proved his case against the Appellant to the requisite standard. Thus, judgment was entered in the Respondent's favour against the Appellant as follows:

[a] Liability - 100%

[b] General Damages - Kshs. 300,000/=

[c] Special Damages - Kshs. 200/=

[d] Costs

[e] Interest at court rates

[3] Being dissatisfied with the Judgment and Decree passed by the lower court, the Appellant filed this appeal on **14 February 2017** on the following grounds:

[a] That the learned trial magistrate erred in law and in fact in finding that the Appellant was liable for the injuries sustained by the Respondent.

[b] That the learned trial magistrate erred in law and in fact in failing to find that the motor vehicle the subject of the suit was not owned and or insured by or in the control of the Appellant.

[c] That the learned trial magistrate erred in law and in fact in failing to appreciate that the Appellant was not and has never been answerable in any traffic case in respect of the incident.

[d] That the learned trial magistrate erred in law and in fact in failing to find that the Respondent did not establish a case against the

Appellant through failure to interrogate the pleadings and evidence of the parties and witnesses, thereby putting the Appellant at a risk of meeting a claim not proved.

[e] That the Judgment of the learned trial magistrate is contrary to the evidence on record and consequently deserves to be vacated in its entirety.

[4] Consequently, it was the Appellant's prayer that the appeal be allowed and that the Judgment and Decree of the lower court be set aside; and that the suit be dismissed with costs to the Appellant.

[5] At the instance of the parties, directions were given herein on **28 May 2019,** that the appeal be canvassed by way of written submissions. Thus, in the written submissions filed herein on **23 July 2019** by Counsel for the Appellant, the following issues were proposed for determination:

[a] Whether at the time of the accident the Appellant was the owner of the **Motor Vehicle Registration No. 47CD54K;**

[b] Whether the Appellant is vicariously liable for the accident;

[c] Whether damages are payable and if so, by whom;

[d] What orders should the Court make?

[6] It was submitted on behalf of the Appellant that it was incumbent upon the Respondent to prove ownership of the subject motor vehicle as required by **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** and **Section 8** of the **Traffic Act, Chapter 403** of the **Laws of Kenya**. Counsel relied on **Nancy Ayemba vs. Abdi Ali** [2010] eKLR; **Joel Muga Opija vs. East African Sea Food Ltd** [2013] eKLR; **Securicor Kenya Ltd vs. Kyumba Holdings Ltd** [2005] eKLR and **Osapil vs. Kaddy** [2000] 1 EA 187, for the proposition that the best way to prove ownership of a motor vehicle is to produce before the court the motor vehicle's registration certificate or a document from the Registrar of Motor Vehicles, showing the name of the registered owner.

[7] Counsel for the Appellant further urged the Court to note that, although reliance was placed by the Respondent on **Kapsabet PM's Traffic Case No. 403 of 2009**, the accused person in that case was not a party to the lower court suit. He therefore faulted the learned trial magistrate for fixing vicarious liability on the Appellant in respect of the negligence of a person who was not a party to the suit before it. The case of **Kaburu Okelo & Partners vs. Stella Karimi Kobia & 2 Others** [2012] eKLR was also cited by Counsel for the Appellant to support his argument that vicarious liability only attaches when the tortious act complained of is done within the scope of one's employment.

[8] On behalf of the Respondent, submissions were filed herein by **Mr. Kitur** on **17 July 2019** reiterating the Respondent's assertions that, at all times material the lower court suit, the subject motor vehicle belonged to the Appellant; and therefore that he was justifiably held vicariously liable for his driver's negligence. He cited **Bayley vs. Manchester Shefield and Liednshire Rly Co.** [1873] LR SCP 148, 421 for the holding that:

> **"Where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the thing done may be the very reverse of that which the servant was actually directed to do."**

[9] Counsel further relied on **Limpus vs. London General Omnibus Company** [1862] I H & C 526 and **Civil Appeal No. 14 of 2014: Paul Muthui Mwavu vs. Whitestone (K) Ltd** in defending the decision of the lower court on liability. As for quantum, **Mr. Kitur** was of the view that **Kshs. 500,000/=** that was proposed to the lower court on behalf of the Respondent would have been adequate. He urged the Court to take into account the nature and gravity of the Respondent's injuries, the medical report produced by **Dr. Aluda,** the P3 Form, as well as the treatment notes that were produced before the lower court as exhibits. He relied on **High Court Civil Appeal No. 233 of 2006: Benjamin Shelemia vs. Scooby Enterprises Ltd** in which the lower court's award of **Kshs. 250,000/=** for dislocation of ankle and bruises was enhanced on appeal to **Kshs. 450,000/=.** He therefore urged the Court not to disturb the lower court's award of **Kshs. 300,000/=**.

[10] I am mindful that this is a first appeal, and as such, it is the duty of this Court to re-evaluate the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing in mind that this court did not have the benefit of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was aptly expressed thus:

> **"...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[11] Accordingly, I have perused and considered the record of the lower court and re-evaluated the evidence that was presented by the parties. The Respondent testified on **23 August 2013** as **PW1**. He adopted his witness statement filed on **7 June 2011** in which he stated that, at around 11.00 a.m. on **17 April 2009**, he was standing on the sideways of Kapsabet-Eldoret road near **Keben Hotel** when he was suddenly hit by **Motor Vehicle Registration No. 47 CD 54K**, Mitsubishi Double Cabin Pick up. He further stated that the driver then took him to the owner of the motor vehicle to discuss the matter but that the owner, the Appellant herein, dismissed his assertions and said he was merely feigning injuries for purposes of unjust enrichment. That with that the driver and owner drove ordered him out of the motor vehicle and drove away. It was therefore the assertion of **PW1** that the subject motor vehicle belongs to the appellant, **Sammy Biwott,** the appellant herein.

[12] **PW1** further testified that he was taken to **Kapsabet District Hospital** for treatment. He produced his treatment notes as well as the x-

ray film before the lower court to back up his testimony. He added that the accident was reported to the police and that he was accordingly issued with a Police Abstract confirming the occurrence. He thereafter visited the clinic of **Dr. Aluda** for examination and a formal medical report on his injuries, for which he paid **Kshs. 2,000/=.**

[13] **Dr. Samwel Aluda (PW2),** a medical practitioner based in Eldoret Town, confirmed to the lower court that he examined the Respondent on **6 June 2013;** and that he presented a history of having sustained injuries in a road traffic accident on **17 April 2009** for which he was treated, as an outpatient, at **Kapsabet District Hospital**. According to **PW2**, the Respondent's injuries, which were basically soft tissue injuries involving his right leg and knee, had healed at the time of examination. He confirmed that, in addition to the physical examination he conducted, he also looked at the Respondent's treatment documents. He then prepared a medical report which he produced before the lower court as an exhibit along with his receipt for **Kshs. 2,000/=** which he charged the Respondent for his services. **PW2** also produced an x-ray film which was taken at his instance to enable him ascertain the state of the Respondent's injured leg as at the time of examination. He confirmed that no fracture was revealed by the x-ray.

[14] The Respondent also called **Daniel Kemboi Keitany (PW3)** who was then serving as a clinical officer at **Kapsabet District Hospital**. His testimony was that while on duty on **17 April 2009**, he attended to **Richard Onyango**, the Respondent herein, in respect of injuries sustained in a road traffic accident. **PW3** stated that the Respondent complained of pain on the right ankle joint; and that on examination he could tell that the patient was in pain. He ordered for an x-ray to be done, which revealed a Pott's fracture of that ankle joint. The patient was thus put on POP and was discharged. **PW3** further stated that the patient's condition was reviewed on **20 May 2009** when the fracture was removed; and that he was doing well.

[15] The Respondent's last witness before the lower court was **PC Margret Ghati (PW4)** of **Kapsabet Police Station.** She confirmed that a road traffic accident occurred on **17 April 2009** in which the Respondent was involved. She produced the Police Abstract in respect of the accident showing that the motor vehicle involved was a Mitsubishi Double Cabin Pick up **Registration No. 54CD 47K.** She further testified that the motor vehicle was being driven by one **Edward Kiplagat Yego**; and that after police investigations, he was found to be at fault, and was accordingly charged with careless driving in **Kapsabet PM's Traffic Case No. 403 of 2009.** It was also the evidence of **PW4** that the said driver was ultimately acquitted under **Section 215** of the **Criminal Procedure Code, Chapter 75** of the Laws of Kenya.

[16] In his defence, the appellant testified as **DW1** before the lower court. He denied that he was the owner of the **Motor Vehicle Registration No. 47 CD 54K,** Mitsubishi Double Cabin Pick Up. He also denied that he was driving the motor vehicle at the time of the alleged accident. He denied any knowledge of or relationship with **Edward Kiplagat Yego. DW1** further pointed out in his evidence that he is not **Sammy Biwott** but **Sammy Kipchirchir Biwott;** and in support of this assertion, he produced a copy of his identity card as an exhibit before the lower court. However, not much turns on this because, in cross-examination before the lower court, **DW1** conceded as follows:

> **"…I do not know whether the accident occurred. I did not hear. I don't know why I am in court. I did not go to the police station. I don't know whether Richard Onyango Nyangoka sustained an injury. I am not aware that a report was made. I am not aware that a doctor testified in court. I am not aware that a police officer testified in court. I am not aware that I took insurance for the said motor vehicle…Exhibit 4 is the police abstract. I do not know what is contained in the abstract… Richard Onyango is the injured party. He was a pedestrian. I don't agree with the contents of the abstract…I am not aware that I did not deny in my defence that my name was Sammy K. Biwott. I am not aware that the plaintiff and the police officer stated that the motor vehicle was mine. I have not produced anything to establish the fact…"**

[17] I therefore entertain no doubt at all that the Appellant is the same person that the Respondent had in mind when he instituted the lower court suit. It is also manifest from the foregoing that the Respondent's evidence that an accident occurred on the **17 April 2009** near **Keben Hotel** within Kapsabet township in which he was injured after being knocked by **Motor Vehicle Registration No. 47 CD 54K,** Mitsubishi Pick Up was not controverted. In addition thereto, **PW4** also gave uncontroverted evidence in this regard and produced the Police Abstract dated **20 June 2009** before the lower court to confirm that a report of the accident was made to the police on **17 April 2009.** It is also not in dispute that the driver of the motor vehicle involved, one **Edward Kiplagat Yego,** was charged with the offence of careless driving. Indeed, the accident was, according to PW4, reported to their station by the said **Edward Kiplagat Yego**.

[18] In addition to the evidence of **PW4**, copies of the proceedings and judgment in **Kapsabet PM's Traffic Case No. 403 of 2009** along with the Charge Sheet and related documents were produced on behalf of the Respondent before the lower court. These documents are to be found at pages 31 to 92 of the Record of Appeal. They indeed confirm that the driver of the subject motor vehicle was charged with careless driving; and that he was acquitted of that charge pursuant to **Section 215** of the **Criminal Procedure Code** on **28 December 2011**.

[19] Thus, granted the stance taken by the Appellant before the lower court, the key issues for determination as regards liability include the question whether the Respondent had discharged the burden of proving that the accident was attributable to the negligence of its driver; that the motor vehicle in question belonged to the Appellant at that particular point in time; and that the said driver was then an employee of the Appellant.

[a] On the allegations of Negligence:

[20] In his narration about the incident, the Respondent testified that he is a *jua kali* artisan; and that on the **17 April 2009** at around 11.00 a.m., he was standing on the sideways of Kapsabet-Eldoret road talking to one of his clients when he was suddenly hit from behind by the subject motor vehicle. The Respondent added that the driver hit him on his right leg as he was getting onto the main road; and that it did not stop immediately but drove for about 100 metres before reversing to the accident scene. As there was no rebuttal evidence, I have no hesitation in holding that the Respondent sufficiently proved the particulars of negligence set out in paragraph 5 of his Plaint. In particular, the Respondent proved that the driver:

> **[a]** failed to take any or any proper lookout or give sufficient regard to other road users;
>
> **[b]** failed to apply brakes in time or at all so as to avoid the accident;

[c] failed to exercise any or sufficient skill and thereby caused the accident.

[b] <u>On Proof of Ownership of the Motor Vehicle Registration No</u>. <u>Registration No. 47 CD 54K and vicarious liability</u>

[21] It is now settled that the best way of proving ownership of a motor vehicle is by production of a Registration Certificate or a Copy of the Records, issued by the Registrar of Motor Vehicles. As was correctly pointed out by counsel for the appellant, the Respondent did not produce a Certificate of Registration or any document to a similar effect from the Registrar of Motor Vehicles to support his assertions and prove that the subject **Motor Vehicle Registration 47 CD 54K** belonged to the Appellant as at **17 April 2009**. Consequently, Counsel for the Appellant relied on and urged the Court to apply **<u>Thuranira Karauri vs. Agnes Ncheche</u>** (supra) in which it was held that:

> **"As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."**

[22] However, there has been a shift, in recent times, from that position to recognize other forms of proof, such as a police abstract. Hence, in **<u>Nancy Ayemba Ngana vs. Abdi Ali</u> [**2010] eKLR**, Ojwang, J,** (as he then was), took the following stance:

> **"There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership - actual ownership, beneficial ownership and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the *matatu* in question…"**

[23] Likewise, in **<u>Charles Nyambuto Mageto vs. Peter Njuguna Njathi</u>** [2013] eKLR, the position was taken that:

> **"…a person claiming or asserting ownership need not necessarily produce a logbook or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say actual, possessory and beneficial all of which may be proved in other ways including by oral or documentary evidence such as the police abstract report even as held in the *Thuranira* and *Mageto* cases that the police abstract report is not of its own, proof of ownership of a motor vehicle. If however there is other evidence to corroborate the contents of police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership."**

[24] The Court of Appeal weighed in on the matter in **<u>Joel Muga Opija vs. East African Sea Food Limited</u>** [2013] eKLR and was explicit that:

> **"It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the *Thuranira* case. In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on a point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."**

[25] In the instant matter, **PW4**, a police officer based at Kapsabet Police Station, produced the Police Abstract in respect of the accident showing that, as at the date of the accident, the owner of the subject motor vehicle, **Registration No. 17 CD 54K**, was the Appellant, **Sammy K. Biwott**. An attempt by the Appellant to buttress his defence by producing a document from the Registrar of Motor Vehicles in the form of a Copy of the Records was unsuccessful after an objection to the production of that document was raised on **23 March 2016** by **Mr. Kitur** for the Respondent. Even if the document had been admitted, its purport was restricted to the position as at **16 November 2010** (see page 27 of the Record of Appeal). It has no connection with the position as at **17 April 2009** and would not have much of much help to the lower court in determining ownership as at **17 April 2009** when the subject accident happened. Thus, the Respondent's evidence was entirely uncontroverted as to the ownership of the subject motor vehicle as at **17 April 2009**.

[26] I note too that in his testimony before the lower court, the Respondent stated how, after the accident, the driver introduced him to the Appellant to enable them discuss the matter amicably before involving the police. That evidence shows that at no point did the Appellant deny ownership of the subject motor vehicle. To the contrary, it reveals that the Appellant was more concerned that the Respondent was feigning injury for selfish gain. It is noteworthy too that, even though the Appellant was served well before hand with the Respondent's witness statement filed on **7 June 2011** (at page 22 of the Record of Appeal), nowhere in his witness statement or testimony before the lower court did he respond specifically to the Respondent's assertions about their encounter on **17 April 2009** after the accident. Instead, he is recorded to have stated thus in his witness statement:

> **"…At the time of the accident … the Motor Vehicle was in the custody of one Edward Kiplagat…"**

[27] It was therefore the obligation of the Appellant to explain to the lower court the connection he had with Edward Kiplagat. **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya***, states that:

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

[28] Also relevant, in the light of the foregoing are **Sections 109** and **112** of the **Evidence** *Act* provide that:

> ***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.***
>
> **...**
>
> ***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him***.

[29] In the premises, rather than take issue with the fact **Edward Kiplagat** was not a party to the lower court proceedings, the Appellant ought to have taken positive steps to ensure his joinder as a Third Party so as to effectively and effectually agitate his line of defence; which he opted not to do. This is because vicarious liability attaches irrespective of whether or not the servant/agent is sued. Thus, in **Rose v Plenty & Another** **[1976] 1ALL ER 97 Lord Scarman LJ** had the following to say:

> **"But basically as I understand it, the employer is made vicariously liable for the tort of his employee not because the employee is an invitee nor because of the authority possessed by the servant, but because it is a case in which the employer having put matters into motion should be liable if the motion that he has originated led to damages or another."**

[30] Likewise, in **Morgans v Launchbury & Others** **[1972] 2 ALL E R 607** the position taken, which is of persuasive value to this Court, was that:

> **"In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task of duty thereby delegated to him by the owner or so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instruction the matter is liable."** (See **Paul Muthui Mwavu v Whitestone** (K) Ltd [2015] eKLR and **Geoffrey Chege Nuthu v M/s Anverali & Brothers** Civil Appeal No. 68 of 1997)

[31] In this matter, there is indubitable evidence that, in recognition of the master/servant relationship, the driver caused the Respondent to be introduced to the Appellant immediately after the incident, with a view of an out of court settlement. Hence, having considered the evidence adduced before the lower court and the written submissions made herein, including the useful authorities cited by learned counsel on vicarious liability, I am satisfied that the appellant was correctly held vicariously liable for its driver's negligence.

[32] It is, in my view, inconsequential that the Appellant's driver was acquitted by the lower court of the charge of careless driving in **Kapsabet PM's Traffic Case No. 403 of 2009,** granted that the standard of proof in such matters are higher than in civil cases. Hence, I would endorse the viewpoint expressed in **Hemal-Kiran Pindolia Suing thro' guardian and husband Pindolia Hemal Babu v Martin Muturi Karugu & 3 others** [2019] eKLR that:

> **"There is a copy of Police accident abstract dated 16th September, 2009 showing the 1st defendant was charged with the offence of careless driving but acquitted under Section 210 of the Penal Code. Acquittal of a driver involved in an accident does not necessarily absolve him of civil liability in a claim for damages. The doctrine of res ipsa loquitor applies in the circumstances.**

[33] Moreover, in **Michael Hubert Kloss & another v David Seroney & 5 others** [2009] eKLR, the Court of Appeal held that:

> **"The acquittal of Kloss in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than "proof beyond reasonable doubt". As this Court stated in Robinson v Oluoch [1971] EA 376:**
>
> **"It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

The converse is also true where there is an acquittal."

[34] On quantum, it is trite that assessment of damages is a matter of discretion; and that, usually, an appellate court will not disturb an award unless sufficient cause be shown. 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."

[35] In the Plaint, the particulars of the Respondent's injuries were furnished at paragraph 7 as follows:

[a] Dislocation of the right ankle joint.

[b] Bruises on the right leg.

[36] The Respondent's testimony that he was injured on the right leg was uncontroverted before the lower court. His testimony was augmented by the evidence of **Daniel Kemboi Keitany (PW3)** who attended to the Respondent at **Kapsabet District Hospital** after the accident. The testimony of **PW3** was equally uncontroverted. He stated that on examining the Respondent, he could tell that he was in pain. He ordered for an x-ray to be done, which revealed a Pott's fracture of that ankle joint. The patient was thus put on POP and was discharged. The same evidence was given by **Dr. Aluda (PW2),** who examined the Respondent on **6 June 2013** and produced a Medical Report in that regard before the lower court. PW2 also pointed out that the Respondent's injuries had healed at the time of examination.

[37] Thus, I have given careful consideration to the Respondent's injuries as aforestated in the light of the submissions made herein by learned counsel, as well as the authorities cited therein. I am equally guided by the expressions made in **<u>H. West and Son Ltd v. Shepherd (1964) AC 326</u> that:**

"…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…"

[38] Likewise, in **<u>Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd</u>** [2013] eKLR, the Court of Appeal held 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…"

[39] The lower court awarded the Respondent an amount of **Kshs. 300,000/=** as general damages and, in this respect, **Mr. Kitur** supported the award on the basis of **<u>High Court Civil Appeal No. 233 of 2006: Benjamin Shelemia vs. Scooby Enterprises Ltd</u>** in which the lower court's award of **Kshs. 250,000/=** for dislocation of ankle and bruises was enhanced on appeal to **Kshs. 450,000/=.** No suggestion to the contrary was made by Counsel for the Appellant. I have also given consideration to **Dennis Mwendwa Mbithe Kathuku v George M. Mwangi [2016] eKLR,** wherein the plaintiff sustained a Pott's fracture on the right ankle joint involving the distal distal tibula, distal tibia and dislocation of the ankle joint. It was noted by the lower court that these were compound fractures and that the bones were exposed and made an award in the sum of **Kshs. 180,000/=.** That award was, on appeal, held to be too low and was therefore enhanced to **Kshs. 450,000/=.**

[40] In the premises, it cannot be said that the lower court's award of **Kshs. 300,000/=** was off mark for being either inordinately high or low. I therefore have no reason to disturb that award. As for special damages, the time-tested principle is that special damages must not only be pleaded with specificity, but must also be specifically proved. In **<u>Provincial Insurance Co. East Africa Ltd vs. Mordecai Mwanga Nandwa</u>**, Civil Appeal No. 179 of 1995, for example, the Court of Appeal stressed 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."

[41] Similarly, in **<u>Maritim *& Another vs. Anjere*</u>** *(1990-1994) EA* the same point was made thus:

"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

[42] Accordingly, in his Plant dated **17 February 2010**, the Respondent set out the following Particulars of Special Damages that he purposed to prove at the hearing:

[a] Medical Report **Kshs. 2,500/=**

[b] P3 Form **Kshs. 500/=**

[c] Police Abstract **Kshs. 100/=**

[d] Treatment Expenses to be attached at hearing hereof

[43] The lower court record shows that, whereas a duly filled P3 Form was produced along with treatment notes, there was no evidence that the Respondent expended **Kshs. 500/=** on account of the P3 Form, or that he incurred expenses towards his treatment. In the same vein, there was no proof that he spent **Kshs. 100/=** to obtain the Police Abstract. What was specifically proved was the fact that the Respondent paid **Dr. Aluda (PW2) Kshs. 2,000/=** for examination and the Medical Report. **PW2** produced an original receipt to that effect dated **6 June 2013** which was marked the **Plaintiff's Exhibit 5(b)** before the lower court. Consequently, while the lower court was correct in dismissing the other special damage items which were not specifically proved, it is inexplicable that she awarded the Respondent **Kshs. 200/=** only in respect of that expense. Clearly, this was a misapprehension on the part of the learned trial magistrate of the evidence presented before the lower court and therefore warrants interference by adjusting the special damage award from **Kshs. 200/=** to **Kshs. 2,000/=,** which I hereby do.

[44] In the result, I find no merit in the appeal and would accordingly dismiss it with costs and confirm the decision of the lower court, save for the adjustment aforementioned.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2020

OLGA SEWE

JUDGE