REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NO. 184 OF 2017

BETWEEN

PETER KAMAU GATHORO ..... APPELLANT

AND

DAVID WAWERU NGANGA .....RESPONDENT

(Being an appeal from the original judgment and decree of Hon. B. Khaemba, Senior Resident Magistrate delivered on 3rd November 2017 in Kiambu Civil Case No. 356 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant, having been dissatisfied with the decision of the trial court aforementioned lodged this appeal on 4.12.2017 seeking *inter alia* that the appeal herein be allowed with costs and that the trial court's decision on future medical costs be set aside and be substituted with an award on the same as prayed for in the plaint being a sum of Kshs. 440,000/- based on the following grounds:-

a) The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant had indeed pleaded for and requested for the court to award him future medical costs.

b) The learned trial magistrate erred in law and fact in failing to apply the legal principles as relates to special damages and erred by stating that future medical costs are special damages yet the same are in the realm of general damages.

c) The learned trial magistrate erred in law and in fact by departing from case law precedent binding upon the Magistrate's court as relate to the award of future medical costs.

d) The learned trial magistrate erred in law and in fact in failing to find that as the appellant had pleaded future medical costs in the plaint then the same should have been awarded as prayed for.

Background

2. The appellant had filed a suit by way of a plaint in the lower court against the respondent where he sought *inter alia* general and special damages together with costs of the suit and interest on the same arising out of an accident that occurred on or about the 14th day of April, 2014 involving the appellant, who was a lawful pedal cyclist; and the respondent's motor vehicle registration number KAN 018L. The appellant claimed that the accident occurred along Kiambu-Githunguri Road in Maigotha or thereabouts, where the respondent's driver, agent and or servant allegedly drove the said motor vehicle so carelessly, negligently and/or recklessly without due care and attention to other road users and in particular the appellant and drove, managed or otherwise controlled the motor vehicle causing it to hit the appellant from behind thereby occasioning him serious injuries. The appellant stated that the accident was solely caused by the gross negligence of the respondent and/or his driver, servant and/or agent and held the respondent vicariously liable for the accident

3. Aside from listing the particulars of negligence of the respondent, his authorized driver servant and or agent; particulars of injuries by the appellant and; particulars of special damages, the appellant added that he would require future treatment or future corrective surgery that would cost him an estimated Kshs. 440,000/- and the appellant prayed that he be awarded the said costs.

4. The suit was defended by the respondent who filed a statement of defence dated 17.2.2016 denying the contents of the plaint therein and blaming the appellant for being negligent and solely causing and/or substantially contributing to the accident in which he was injured.

5. The suit proceeded by way of oral evidence on the issue of damages after consent on liability was entered in the ratio of 80%:20% in favour of the appellant against the respondent. At the conclusion of the trial the learned trial magistrate entered judgment for the appellant as against the respondent as follows:

General damages

a) Pain and suffering	***Kshs. 500,000/-***	
b) Loss of earning capacity	***Kshs. 500,000/-***	
Subtotal	***Kshs.1,000,000/-***	
Less 20% contribution	***Kshs. 200,000/-***	
		Kshs. 800,000/-
Add Special damages	***Kshs. 8,500/-***	
Total	***Kshs. 808,500/-***	

The court also awarded costs of the suit and interest from the judgment date until payment in full

6. On the issue of future medical expenses, the learned trial magistrate held:

> ***"On the claim of the cost of future medical treatment, it is trite law that parties cannot raise a claim or seek relief that does not have a foundation in the plaint……Therefore in the absence of the specific plea for future medical expenses and/or authorities it is my considered view that the court cannot make any award and the claim is dismissed"***

It is the said judgment that forms the basis of the instant appeal. The appeal was disposed by way of written submissions which are on record.

7. Firstly, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis only bearing in mind the fact that this court did not have an opportunity to hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to: ***"…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions."*** This was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

> ***"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."***

The appellant's submissions

8. The appellant submitted that the learned trial magistrate directed himself to the wrong principles while determining the claim of future medical expenses stating that from the plaint, more so paragraph 9, he had specifically pleaded and lead evidence on the same and was thus entitled to the award. The appellant added that Dr. G.K Mwaura did testify on the future medical costs and the submissions of the appellant also claimed the same but then the learned trial magistrate erroneously stated that the appellant did not plead for the future medical costs. The appellant stated that he specifically pleaded to be awarded Kshs. 440,000/- and this was evidenced by the medical report of the said Dr. G.K Mwaura dated 27th August 2015 and marked as P*Exhibit 1(a)* where Dr.Mwaura clearly stated that the appellant would require to undergo future treatment for re-fracture of the femur,re-alignment, internal fixation(planting) and future removal of the metal implant plates and that this would cost Kshs. 440,000/-.

9. The appellant thus added that the court attendance fee of the doctor amounting to Kshs. 10,000/- was not dealt with by the trial court and yet the same was supported by the doctor who produced the receipt in evidence as P*Exhibit 1(c)*. The appellant urged the court to deal with the issue as the cost was incurred only after the doctor attended court to testify and produce the report.

10. The appellant submitted that he had demonstrated that this court can interfere with the trial court's refusal to award future medical costs and the doctor's court attendance costs on the strength of the submissions and authorities cited. The appellant urged the court to award damages for future medical treatment to the tune of Kshs. 440,000/- as prayed for in the appellant's plaint and the doctor's court attendance costs of Kshs. 10,000/- that was paid on the day of the hearing.

The respondent's submissions

11. The respondent submitted that they did not deny the contents of paragraph 9 of the appellant's plaint but reiterated that though the claim for future medical costs are under the rubric of general damages, they were in their nature special damages which ought to be specifically pleaded and proved for them to be awardable. The respondent urged the court to find that future medical costs are in their nature special damages which not only have to be pleaded but specifically proved as had been determined by the learned trial magistrate.

12. The respondent further submitted that failure to include future medical costs in the prayers head sought by the appellant in his plaint amounted to defective pleading with the resultant effect that the same were not specifically pleaded and thus fatal to its eventual award. The respondent added that the parties were bound by the pleadings and so was the learned trial magistrate whose hands were tied as the appellant had not specifically pleaded future medical costs within the prayers sought.

13. The respondent made similar submission regarding the appellant's quest to be awarded Kshs. 10,000/- for the doctor's court attendance fee stating that the appellant had not sought for the same in his pleadings and more so the grounds of appeal as per the memorandum of appeal if indeed he was aggrieved by the same. The respondent added that seeking the said costs through the submissions amounted to amending the memorandum of appeal unprocedurally and that it was within the court's discretion and not the appellant to consider any other grounds of appeal other than those set out in the memorandum of appeal.

14. The respondent submitted that should the court be inclined to award the appellant the alleged future medical costs, then the court should adopt the assessed amount of Kshs. 180,000/- by Dr. Wambugu P.M in his medical report dated 16th August 2016 as the said report was the latest duly taking into consideration the factors of inflation.

Legal Analysis and Determination

15. I have gone through the record and written submissions together with the authorities cited therein by both parties and from my deduction, the following are the issues for determination:

a) Whether the trial court erred in not awarding the appellant Kshs. 440,000 as future medical expenses.

b) Whether the court ought to award the appellant Kshs. 10,000 as the doctor's court attendance fee.

a) Whether the trial court erred in not awarding the appellant Kshs. 440,000 as future medical expenses

16. The Court of Appeal, in the case of ***Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR (*P. K. TUNOI,J.W.ONYANGO OTIENO, P. N. WAKI JA)** held that:

> ***"We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated: -***
>
> ***"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."***
>
> ***We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."***

(Also see the Court of Appeal, in the case *of* ***Mbaka Nguru & Anor. Vs James George Rakwar[1998]eKLR*(Omolo, Tunoi and Shah JJ.A)**

17. That being the position in law, the question then is whether the claim for future medical expenses was pleaded in the case before the trial court for it to make an award on it. I have perused the appellant's plaint dated 28th December 2015 and more specifically paragraph 9 of the body of the plaint which states as follows:

> *"9.* ***The Plaintiff further states that as a result of the accident, his leg has become shortened by about 2 inches hence the plaintiff shall require future treatment or future corrective surgery that will cost an estimated sum of Kshs. 440,000/- and the plaintiff prays that he be awarded the said costs"***

18. Clearly the issue of future medical expenses was specifically pleaded in the body of the plaint and I do not agree with the submissions of the respondent that the same ought to have been raised under the prayers' head for the issue to be regarded as pleaded or for it to be awardable by the court. Such an approach would be against the principle of substantive justice under ***Article 159(2) of the Constitution of Kenya*** in that our jurisprudence and decisional law no longer countenances this kind of technical and formalistic justice (See ***Civil Appeal No. 19 Of 2016, Anchor Limited Vs. Sports Kenya)*** The issue of future medical expenses was plainly before the trial court both in the pleadings and in evidence and the court had a duty to decide on it even though it was not under the prayers' head of the plaint as the appellant had specifically prayed for it in the body of the plaint. The learned trial magistrate was therefore in err in holding that the claim for future

medical expenses was not pleaded in the plaint.

19. Having found that the issue of future medical expenses was specifically pleaded to be Kshs. 440,000/-, the next question is whether it was proved. **Dr Genye Mwaura** testified as PW1 and stated that on 27th August 2015 he examined the appellant who had been involved in the accident on 14th April 2015, close to four months earlier. PW1 produced a medical report dated 27th August 2015 and marked *Pexhibit 1(a)* which indicated among others that appellant would incur future costs amounting to Kshs. 440,000/- for re-fracturing of the right femur, re-alignment, internal fixation(planting) and future removal of the metal implant plates. PW1 gave evidence that these future medical expenses were approximates and standard charges and they could not be lower than that. In my considered view, and on a balance of probabilities, the appellant proved the costs for future medical expenses.

20. The respondent had submitted that should the court be inclined to award the said costs for future medical expenses, then it should be guided by the medical report of Dr. Wambugu P.M on record. However, I note that the report was filed by the respondent in his "list of documents" but the said Dr Wambugu was neither called to testify nor produce the said medical report as evidence. The fact that this medical report was filed but not produced as evidence means that it does not form part of the judicial and evidential record. (See the Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR).*** Even if the court were to consider the report, its probative value and weight is low as the maker was never cross-examined on it to test its veracity and accuracy. To this end, I find that the court cannot rely on this medical report by Dr. Wambugu P.M

21. To this end, I find that the learned trial magistrate erred in not awarding the appellant Kshs.440,000/- in future medical costs in as much as the same was specifically pleaded and proved.

b) <u>Whether the court ought to award the appellant Kshs. 10,000 as the doctor's court attendance fee</u>

22. Dr. Genye Mwaura produced a receipt as *Pexhibit (c)* which he stated was for payment of court attendance fee that he had charged the appellant. This was never pleaded by the appellant in his plaint. As has been stated before, it is trite that special damages must not only be specifically pleaded but they must be strictly proved. Since the same was not pleaded, the court cannot grant it as one can only prove what is contained in the pleadings. Furthermore, the doctor was a witness. Any sums of money paid to him to facilitate his court attendance to testify on behalf of the appellant is a witness expense therefore a cost of the suit incurred. It can only be claimed as a cost of the suit by way of witness expenses. It is not a special damage.(Also See **R.E Aburili J** in ***Duncan Kimathi Karagania v Ngugi David & 3 others [2016] eKLR)*** and **J.N. Mulwa J** in ***Cliff Benard Nyagaka & another v Yiming Wang [2019] eKLR)***

23. In the foregoing, it is my considered view that this court cannot award the appellant Kshs.10,000/- for the doctor's court attendance fee as this was not pleaded.

<u>Conclusion and Disposition</u>

24. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, cited the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** at p. 730 where **Kneller J.A**. said:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied either that the judge, in assessing the damages, <u>took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419</u>. This Court follows the same principles."***

25. The Court further makes reference to the case of ***Gicheru V Morton and Another (2005) 2 KLR 333*** where the Court stated:

> ***"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

See also ***Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.***

26. In conclusion, I find that the learned trial magistrate erred by leaving out a relevant factor in his award of quantum. Future medical expenses of Kshs. 440,000/- were specifically pleaded and proved and ought to have been granted as part of the final award. On the other hand, the expense of the doctor's court attendance was not pleaded and thus cannot be granted.

27. For the foregoing reasons, I find and hold that this appeal is merited and ought to be allowed. I accordingly set aside the final award of the learned trial magistrate of Kshs. Kshs. 808,500/- and substitute the same with the final award of **Kshs. 1,248,500/-** with interest from the date of judgment of the lower court until payment in full. The appellant shall also have the costs of the suit and half the costs of this appeal.

28. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this **11th** day of **June, 2020**

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HON.LADY JUSTICE.CHRISTINE W. MEOLI

JUDGE