REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 54 OF 2018

JANE NJERI MACHRIA.....APPELLANT

-VERSUS-

GODFREY MURIMI MUYA.....1ST RESPONDENT

SAMUEL KARIUKI.....2ND RESPONDENT

(Being appeal against judgment and decree Karatina Senior Principal Magistrates Court Civil Case No. 62 of 2013 (Hon. F.W. Macharia, Senior Principal Magistrate) dated 13 September 2018)

JUDGMENT

The appellant sued the respondents in the magistrates' court for general damages for pain and suffering; special damages; costs of the suit and interest thereof. According to her plaint initially dated 11 June 2013 but subsequently amended on 19 July 2013 and filed in court on 18 September 2013, the appellant was travelling in motor vehicle registration No. KAZ 012J (Toyota Hiace Matau which I will henceforth refer to as "the matatu") as a fare paying passenger when it collided with motor vehicle registration number KBC 442 V (Toyota Corolla saloon). The accident occurred along Karatina-Nyeri road on or about 4 May 2011.

The respondents were respectively described in the plaint as *"the insured person to motor vehicle registration No. KAZ 012J-Toyota Hiace matatu"* and *"the registered owner legal and/or equitable of motor vehicle registration No. KAZ 012J Toyota Hiace matatu."*

The appellant further averred that the accident occurred as a result of carelessness or negligence of the "defendant", his authorised driver, servant or agent. As a result of this accident she sustained serious bodily injuries. She also claimed special damages which she particularised as:

> ***"(a) Police abstract Ksh. 200***
>
> ***(b) Medical report Ksh. 2,000***
>
> ***(c) Doctors court attendance (to be stated)."***

The respondents disputed the appellant's claim and in their defence amended on 2 October 2013, they denied ownership of the matatu in any capacity, whether beneficial, equitable or legal. In any event, they also denied that the appellant was a passenger in the matatu at the material time or that the matatu was involved in a road traffic accident as alleged or at all. Neither did they admit any negligence or carelessness on their part.

In the alternative to their denial, they contended that if any accident occurred at all, it was solely caused or substantially contributed to by the appellant.

Further, and in the alternative, they averred that the accident was solely caused or substantially contributed to by the driver of motor vehicle registration number KBC 442 V when he encroached on the lane in which the matatu was travelling thereby colliding with it. They also pleaded that the accident was inevitable.

They denied that the appellant sustained any injuries or suffered any loss either as particularised or at all.

The learned magistrate dismissed the appellant's suit with costs. Her main reason for dismissing the suit was that a third party who was not party to the suit was to blame for the accident. It is against this decision that the appellant appealed; in her memorandum of appeal dated 25 September 2018 she raised six grounds of appeal; as far as I understand them, they are as follows:

1. The learned trial magistrate erred in law and in fact in failing to award the appellant damages yet she was a fare paying passenger in the respondents' vehicle.

2. The learned trial magistrate erred in law and in fact by dismissing the appellant's case against the respondents yet she was not liable in negligence or contributed to the accident in any way.

3. The learned trial magistrate erred in law and in fact in failing to find that the respondents were duty bound to invoke Order 1 Rule 15 of the Civil Procedure Rules and join a third party whom they claimed contributed to the accident.

4. The learned trial magistrate erred in law and in fact by taking the position that the respondents ought not to bear the responsibility to join a third party to the proceedings and thereby disregarded Order 1 Rule 15 of the Civil Procedure Rules.

5. The learned trial magistrate erred in law and in fact because she was biased against the appellant.

6. The learned trial magistrate erred in law and in fact by dismissing the appellant's suit yet she had discharged her burden of proof against the respondents.

The record shows that the appellant's testimony at the hearing was relatively brief. She stated that she was aged 58 as at 2 March 2017 when she testified. She adopted her statement filed earlier as her evidence. In that statement she stated that on 4 May 2011 she was lawfully travelling as a fare paying passenger in the matatu when the said motor vehicle was driven so negligently or carelessly that it collided with motor vehicle registration number KBC 442 V Toyota Corolla Saloon. The accident occurred on Nyeri-Karatina Road. As a result of the accident, she sustained serious bodily injuries. She stated in her testimony that she was injured on the right eye and lower limb. She also suffered compound fractures on both legs. As result of the injuries, she was admitted in hospital for three months.

As part of her evidence, she produced medical reports by her own doctor and the respondent's doctor; a p3 form and a discharge summary. She also referred to a copy of an abstract of the report made to the police concerning the traffic accident; a copy of an abstract from the records of the Registrar of Motor Vehicles showing that the 2nd respondent was the registered owner of the matatu and a copy of the notice of her intention to sue.

In answer to questions put to her during cross-examination, she testified that she had boarded the matatu at Tea Room. She could not recall the registration number of the vehicle that collided with the matatu. She, however, said that the collision occurred on the matatu's lane. She also confirmed that she had fastened the seat belt at the material time.

Senior Sergeant David Kupende (PW3) confirmed in his testimony that an accident involving the matatu and vehicle registration number KBC 442 V occurred on 4 May 2011 and was entered in the occurrence book at Karatina traffic base as number 4/4/5/11. Several people including the appellant were injured in the accident. He produced the police abstract of the accident. Upon cross-examination, the officer testified that motor-vehicle registration number KBC 442V was to blame for the accident as it rammed into the matatu.

The 1st respondent testified that he was the driver of the matatu and that on 4 May 2011 he was driving from Karatina to Nyeri. At a place called Kianjogu, he saw a stationery vehicle ahead; it had apparently broken down and stalled on the road. He thought it had broken down because there were twigs on the road as one approached the vehicle; the twigs were apparently intended to warn other motorists of the broken down vehicle ahead. He slowed down to overtake the vehicle but there was an on-coming vehicle registered as No. KBC 442 V. It was his evidence that it was being driven at very high speed. It drove into the lane in which he was driving and collided with his vehicle. He confirmed that he had 14 passengers in his vehicle. He blamed the driver of "the other vehicle" for the accident.

Another officer from Karatina traffic base identified as **Miss Mwangi (DW2)** testified that the accident was investigated by corporal Simiyu but who had since been transferred to Salgaa police station. It was her evidence that the impact was on the left lane facing Nyeri town from Karatina. It was her evidence that the driver of motor vehicle KBC 442 V died on arrival at the hospital. As far as she was concerned, the matter was still under investigation as at 3 May 2018 when she testified.

Upon cross-examination she admitted that one could not tell the point of impact from the occurrence book. And no report had been made by any eye witness of how the accident happened. She confirmed that the appellant was one of the passengers in the vehicle.

It is unfortunate that the driver of motor vehicle registration number KBC 442 V is alleged to have perished in the accident but if the testimony of the 1st respondent is anything to go by, it would suggest that he, the 1st respondent, was solely responsible or largely contributed to the accident. As I understand his evidence, the accident occurred when he slowed and attempted to overtake a vehicle ahead of him; this vehicle had broken down and stalled on the road. He could only have overtaken the vehicle if it was on the same lane he was driving; this implies that both his vehicle and the vehicle ahead of him were on the left lane in the direction of Nyeri from Karatina. If he attempted to overtake that vehicle, it is logical that he drove into the right hand side lane in which the oncoming vehicles from the opposite direction were travelling. Logically, and from my assessment of the evidence, the matatu must have moved in to the right hand side lane in which motor vehicle registration number KBC 442 V was travelling as a result of which the fatal collision occurred. This is more probable considering that the matatu must have suddenly moved into the right hand side lane to avoid ramming into the stalled vehicle and therefore the driver of vehicle registration number KBC 442 V might not have had sufficient time to avoid the collision.

But that is beside the point. According to the learned magistrate, it was the driver of motor vehicle registration number KBC 442 V that was to blame for the accident and for that reason, the respondents could not be held liable for his negligence; in her own words, the learned magistrate stated as follows:

"I have considered the evidence by both the plaintiff and the defendant. Even though the plaintiff stated that the 1st defendant

was to blame for the accident, the two traffic police officers and the 1st defendant gave evidence that the blame was on the driver to (sic) m/v KBC 442 V.

"I have considered the defendants had made an application to enjoin (sic) a 3rd party to the proceedings. The third party was the registered owner of M/v KBC 442V. The application was dismissed on grounds of inordinate and inexcusable delay by the defendants in bringing the application despite leave having been granted by the court within reasonable time. The defendants should not suffer for the laxity on the part of their counsel by failing to put in the 3rd party proceedings within reasonable time."

The learned magistrate continued;

"From the evidence of the 1st accused (sic) and the 2 traffic police officer (sic), the blame was on the 3rd party who is not party to the suit…"

And with that, she held that the appellant had not proved her case that the respondents were liable for the accident.

With due respect to the learned magistrate, she misdirected herself on the facts and the law and inevitably reached a wrong conclusion. For reasons I have given, the facts point to the conclusion that of the two drivers, the matatu driver must have been the one on the wrong.

Secondly, it was the evidence of DW2 that the case was investigated by corporal Simiyu who had since been transferred to a different station; curiously she stated that investigations were still underway as at 3 May 2018 when she testified. Even then she admitted that she was not the investigation officer and her only source of information with regard to the accident was the occurrence book extract. All she came to relate was what was contained in the police file. But there was nothing much in that file beside what was reported in the occurrence book. That report did not say how the accident occurred and this was confirmed by the officer in answer to questions put to her during cross-examination. This is what she said:

"I am referring to OB No. 4/4/5/11. From the OB one cannot tell the point of impact. Cpl Simiyu made the OB entry at 13.20 hours. There is no report made by a civilian. I recorded the statement of the driver. I do not have the statement of the other driver as he is deceased. There was no eye witness. Jane Macharia was one of the passengers in the matatu. The driver was on(sic) duty of care to his passengers."(emphasis added).

The point is, there was no factual foundation upon which this officer could lay the blame for the accident on the driver of motor vehicle registration number KBC 442 V and to that extent, the learned magistrate erred in relying on her evidence to find that the driver of this particular vehicle was to blame for the accident.

More importantly, there was no legal basis for finding fault with the driver of motor vehicle registration number KBC 442 V. There was a suggestion that he perished in the accident although there was no proof of his death. But whether alive or dead, he could certainly not be condemned unheard.

Going by their own averments, the respondents were of the firm view, albeit in the alternative, that a third party was to blame for the accident; it follows that they were entitled to invoke third party proceedings under Order 1 Rule 15 of the Civil Procedure Rules. That rule states as follows:

15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

There is evidence that indeed the respondents invoked this particular rule and sought for leave to issue a third party notice to a third party but their application was rejected; in the ruling dismissing the respondent's application the learned magistrate held, inter alia;

"The defendants therein filed a chamber summons dated 31/8/15, brought under order 1 Rule 15 of the Civil Procedure Rules. The said application was supported by an affidavit, which is undated, sworn by Sandra Nyakweba, the Claims Director at Directline Assurance Company Ltd, the insurers of the defendants' vehicle. The said application is the subject matter of this ruling. The defendants sought for the following orders:

a. That the defendants/applicants be granted leave to issue and serve Third Party Notice upon Maina Timothy, as per the annexed draft Third Party Notice annexed hereto.

b. That time be fixed for the proposed Third Party Notice annexed hereto.

c. That the costs of this application be in the cause.

The application was not opposed. The court however directed that the application be determined on its own merits and a date for ruling was given."

As Rule 15 (1) expressly states, the application for leave to issue a third party notice is usually heard ex parte but for some reason the learned magistrate determined that the application should be heard "on its own merits". Even then, it is apparent from the learned magistrate's ruling that when the appellant's learned counsel was invited to respond to the application, he did not oppose it. The learned magistrate was still not satisfied because she proceeded to dismiss the application on grounds that the respondents had earlier been granted leave to file their application within 30 days from 4 April 2014 but that they had failed to do so; and, in any event, the application had been filed two years after the pleadings had been closed.

Without delving into the merits or lack thereof of the learned magistrate's decision to dismiss the respondents' application, there was no basis upon which a third party could have been found liable for the tort in question when no notice of the claims or allegations against him had been issued as contemplated under sub rules (2) and (3) of the Order 1 Rule 15. According to sub rule (2) the claims against a third party would only be brought to his attention once the third party notice has been issued as contemplated in sub rule (1) and served in accordance with the rules relating to service of a summons. Sub rule (3) prescribes the contents and form the notice takes; it has to state the nature and the grounds of the claim against the third party.

According to rule 22 of order 1, once a third party has been duly served, he will enter appearance and it is only after the entry of appearance that the court may determine the question of liability as between the defendant giving the notice and the third party and when such question will be determined. That rule states as follows:

22. If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

In the face of this rule, it is obvious that it was not open for the learned magistrate to find a third party liable for the road traffic accident in which the appellant was injured when the learned magistrate herself had declined to issue a third party notice against the third party and consequently when no third party proceedings could be taken to determine how and when the question of liability could have determined between the respondents and the third party.

Assuming that the third party was liable for the accident, would the appellant be punished for non-joinder? in the first place, according to Order 1 rule 9, no suit shall be defeated by reason of the misjoinder or non-joinder of parties. More importantly however, the obligation to include a third party in her suit was not on the appellant herself; it lay squarely on the respondents once they pleaded that a third party was to blame for the accident. Indeed, it has been noted that they made efforts to include the third party in the proceedings but their efforts were thwarted by the learned magistrate.

Whatever the case, the appellant could not bear the brunt of failure to join the third party to proceedings and have her suit dismissed when the learned magistrate herself had ruled against the inclusion of the third party. Indeed, it is a contradiction of sorts that on the one hand the learned magistrate declined the application to join a third party to the suit and, on the other hand, dismissed the appellants suit because a third party was not party to the suit.

For reasons I have given, there is absolutely nothing the appellant could do to avoid the accident; as a passenger she had no means of driving, managing or in any other way controlling the matatu. It follows that as between her and the respondents, the latter were solely responsible for the accident and her suit against them ought to have succeeded in that respect.

The next question for determination is that of quantum of damages payable to the appellant.

In the appellant's plaint amended on 19 July 2013, she particularised the injuries she sustained as a cut wound on the right periorbital region; blunt injury on the upper lips and a compound fracture on the right tibia and fibula and a closed fracture on the left tibia and fibula.

And in her testimony, the appellant stated that she sustained injuries on her right eye and on the lower limb. That she suffered compound fractures on both legs. As a result of these injuries she was admitted in hospital for three months.

She produced two medical reports from her own doctor and the respondents' doctor. The respondent's doctor's report was dated 25 June 2013, the same date that the appellant was examined. Upon this examination, it was established that the appellant was generally in a good condition walking with a normal gait. She had no complaints at the time of examination. She had scars on both shins. The initial x-rays confirmed fractures on bilateral tibia fibula. There was also evidence of healing mid-shaft fractures. However, there were no physical disabilities resulting from the injuries. The doctor noted that the surgical implants will need to be removed, an exercise that would cost Kshs. 50,000/= in a government facility. He opined that the osteoarthritis features that the appellant was experiencing was as a result of 'the normal bodily wear as a result of her age.'

The appellant had been examined earlier by her own doctor and in his report dated 11 February 2013 he established that the appellant had sustained a cut wound on the right periorbital region and a blunt injury on the upper lip. She had sustained compound fractures of the right tibia fibula bones. X-rays confirmed the fractures. Part of the treatment the appellant received was open reduction and internal fixation of both tibia bones with plate and screws. At the time the appellant was examined, she walked with a supporting stick; she had a 12 centimetre scar on her right leg and an 11 centimetre scar on her left shin. In both shins the implant was felt. She had stiffness of both joints.

In the doctor's opinion and prognosis, the appellant suffered a lot of pain; had permanent scars on both legs; she was exposed to radiation through x-rays. Again she had early features of osteoarthritis on both knee joints and that she will require physiotherapy for the rest of her life. The plates and the screws would be removed at a cost of Kshs. 80,000/=.

The appellant asked for Kshs. 1.8 Million as general damages for pain and suffering; she relied on the decisions in **Nakuru High Court Civil Case No. 403 of 2012 Zipporah Nangila versus Eldoret Express & 2 Others** and **Nairobi High Court Civil Case No. 658 of 2009 James G. Ngugi versus Multiple Haulers E.A. Ltd & Another.**

In the **Zipporah Nangila versus Eldoret Express & 2 Others**, the claimant suffered bilateral leg injuries; the right wrist injury; fracture dislocation and comminuted compound fracture of the distal and fibular. Other injuries were fracture of the left distal and tibia and fibular; she also suffered extensive skin loss with bones exposed in the right tibia. The doctor opined, inter alia, that the sustained bilateral severe leg injuries with the right ankle and foot permanently stiff were like a stump which may not function even in modified shoes. The functional loss with a lifeless right foot and ankle was assessed at 70%. She needed surgery that would cost Kshs. 300,000/=. She would also need special shoes on the right leg permanently and this would cost up to Kshs. 15,000/= per shoe. The claimant would also need a major operation to fuse the right ankle at an estimated cost of Kshs. 600,000/=. She would also permanently limp because of her permanent deformity. The court (Mulwa, J.) made an award of Kshs. 2,400,000/= as general damages for pain and suffering.

In **James G. Ngugi versus Multiple Haulers E.A. Ltd & Another**, the plaintiff was awarded Kshs. 1,500,000/= as general damages for pain and suffering. He was established to have sustained compound comminuted fracture of the right tibia and compound comminuted fracture of the right fibula; a fracture of the left proximal radius; a fracture of the left ulna; head injury; a deep cut wound of the parietal region; soft tissue injuries and bruises of both hands; multiple facial cuts and lacerations; and pathological refracture of the right leg. There were other multiple residual injuries.

The respondents, on the other hand, submitted that an award of Kshs. 500,000/= would be an adequate compensation under the head of general damages and relied on the case of **Michael Gichoni Mwangi versus Peter Mwangi & Another (1990)** eKLR which was itself cited in **Johnson Mose Nyaundi (Minor suing through next friend and father of Wilfred Wadime Nyaundi) versus Petroleum Services Ltd (2014) eKLR** in which the plaintiff is alleged to have suffered a compound fracture of the right tibia and fibula bones. He sustained lacerations on the left leg with associated profuse bleeding. He was hospitalised for two weeks and continued with the treatment for three months as an outpatient. He underwent a second minor operation to correct a mal-union and bone grafting. When he was examined, he was still walking on crutches and with a limp. The fracture site was painful and the leg had become shorter by half an inch. He was unable to walk for long distance. He had several 6 inch scars on the legs and he needed further operation to remove the metal plates. His permanent incapacity was assessed at 20%. He was awarded Kshs. 350,000/= In 1998. It was the respondents' contention that the injuries suffered were severer than what the appellant suffered.

The respondents did not file any of the copies of the two decisions together with their submissions; however, I located the judgments on the Kenya Law website; in **Johnson Mose Nyaundi (Minor suing through next friend and father Wilfred Wadime Nyaundi versus Petroleum Services Ltd (2014) eKLR the** claimant was awarded Kshs. 180,000 in general damages for pain and suffering. The injuries were summarised by his own doctor in the following words:

"Apart from the fracture the other injury was soft tissue injuries. By the time of examination, the fracture had healed."

As far as **Michael Gichoni Mwangi versus Peter Mwangi & Another (supra)** is concerned, the facts were as stated by the respondents in their submissions.

It does not appear that the learned magistrate discussed any of the decisions cited by both parties; she instead relied on a decision which is cited in her judgment as **Machakos High Court Civil Case No. 55 of 2001, Mary Nthenya Nzomo versus Headmistress Machakos Girls & 2 Others** where the claimant is alleged to have been awarded Kshs. 1,250,000/= for "compound fractures which were more serious than those suffered by the plaintiff in this case." Unfortunately, I couldn't find a copy of this judgment in the record and my search on the Kenya Law website did not yield any results either. Nonetheless, based on the alleged judgment, the learned magistrate concluded that had the appellant's suit succeeded she would have awarded her Kshs. 1,000,000/= in general damages. She would also have awarded Kshs. 80,000/= for future medical expenses and Kshs. 2000/= in special damages.

The general principle on whether this court can interfere with assessment of damages by a subordinate court is that while such an assessment is a function of the discretion of the trial court, the appellate court will be called upon to interfere with it if, in the exercise of its discretion, the trial court either took into account an irrelevant factor or left out a relevant factor or that the award it made was too high or too low as to amount to an erroneous estimate, or, that the assessment is based on no evidence, in any event. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms: -

> ***"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."***

This point had earlier been captured by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd versus Shepherd (1964) AC 326 in the following words:**

> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award by himself would have made. Having done so, and remembering that in his sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment." (see page 353).***

Paying *'regard to the range and limits of current thought'* would imply that comparable injuries should be compensated by comparable awards which is why it is important have regard to previous court decisions where awards have been made in claims where the injuries sustained are as near as possible to the case at hand. If it is demonstrated that such was the basis of an award in, say general damages for pain and suffering, there may be little basis to interfere with the lower court's assessment.

In the **West (H) & Son Ltd versus Shepherd** case (supra) Lord Morris reiterated this point as follows:

> ***"My Lords the damages which are to be allowed for tort are those which "so as money can compensate, will give the injured party reparation for "the wrongful act and for all the natural and direct consequences of the "wrongful act." (Admiralty Commissioners versus S.S. Susquehanna (1926) A.C. 665,661). The words "so far as money can compensate "point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But 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 assent 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.***

The two decisions cited by the appellant involved cases where claimants sustained severer injuries than those suffered by the appellant. On the other end, the injuries which the claimant suffered in the case cited by the respondents were less severe.

So, if the three cases are to be regarded as comparable and a reasonable guide to the general damages for pain and suffering that the appellant would be entitled to, the award under this head would be lower than the award made in the cases cited by the appellant and higher than the award made in the decision cited by the respondents.

I would also consider the inflationary trend since the awards were made particularly with respect to the decision cited by the respondents; the award in **Michael Gichoni Mwangi versus Peter Mwangi & Another** was made in 1998, more than 20 years ago.

Taking all these factors into account I would opine that an award of Kshs. 800,000/= in general damages for pain and suffering would be a near adequate compensation for the injuries that the appellant sustained and the pain she had to bear.

As far as special damages are concerned, she would be entitled to the sum of Kshs. 2,000/= being the fee paid for the medical report and which was pleaded and proved.

The claim for Kshs. 80,000/= to cater for future medical expenses would be refused because it was not pleaded; ordinarily future medical expenses would be treated as special damages that must be pleaded and proved or reasonably estimated.

In ***Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR*** **the Court of Appeal** said of these future expenses as follows:

> ***"We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard."***

And in **Kenya Bus Services Ltd versus Gituma (2004) E.A. 91** the Court of Appeal 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 damages 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 principal 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."***

The appellant's appeal would be allowed and the trial court's judgment set aside; it is instead substituted with the order allowing the appellant's claim in the following terms:

(a) General damages for pain and suffering Kshs. 800, 000/=

(b) Special damages Kshs. 2, 000/=

The appellant shall also have the costs of the suit in the magistrate's court and costs of the appeal. The interest on the net award shall be calculated at court rates from the date of the delivery of the judgment in the lower court. It is so ordered.

Signed, dated and delivered on 2 October 2020

Ngaah Jairus

JUDGE