REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 32 OF 2018

DENNIS KAVEKE.....APPELLANT

VERSUS

NEIL KUSUMO.....RESPONDENT

(Being an appeal of the Judgment of Hon. R. K. Ondieki, PM,

delivered on the 16th of April 2018 in Kilifi SRMCC No. 239 of 2014)

CORAM: Hon. Justice R. Nyakundi

Okello Kinyanjui for the Appellant

Otieno B. N for the Respondent

JUDGMENT

The points in this appeal are set out below as lifted from the Memorandum of appeal against the respondent:

1. That the Learned Magistrate erred in law and in fact in not properly appreciating the evidence that was before him.

2. The Learned Magistrate erred in law and in fact in making a finding that the defence did not offer any evidence when he was, in fact, the person that blocked the defendant from offering his evidence.

3. The Learned Magistrate erred in law and in fact in refusing the application by the defendant for an adjournment to enable him call a vital witness.

4. The Learned Magistrate erred in law and in fact in failing to realize that Order 11 of the Civil Procedure Rules is merely procedural and should not be allowed to override the substantive rights of the parties.

5. The Learned Magistrate erred in law and in fact to apply the binding principle in the case of Peter Migiro vs Valley Bakery Ltd, which the Honourable magistrate chose to ignore and in doing so the learned Magistrate violated the first principles of the principle of stare decisis.

6. The Learned Magistrate erred in law and in fact, in not making a finding that without treatment notes, it cannot be ascertained whether the respondent did, in fact get injured in the alleged accident.

7. The Learned Magistrate erred in fact and in law, in failing to appreciate and make a finding on the fact that among the respondent's documents, there was a document that clearly showed that the respondent was attending medical treatment even before the accident.

8. The Learned Magistrate erred in law and in fact in making a finding on general damages that was too high in the circumstances.

9. The Learned Magistrate erred in law and in fact in making a finding on general damages that had absolutely no basis and

was not supported by any decision of the superior courts.

10. The Learned Magistrate erred in law and in fact in finding that merely because the respondent had a 18% incapacity, he was entitled to the unreasonable and unsupported damages of Kshs.1,500,000/= for the injuries allegedly sustained.

11. The Learned Magistrate erred in law and in fact in completely ignoring the decision of the High Court in Naminda vs Cheruyiot [2005] eKLR and Akamba Public Road Services vs Abdikadir Adan Galgalo [2016] eKLR and in doing so violated the first principles of stare decisis, which bind him.

12. The Learned Magistrate erred in law and in fact for making a finding that the appellant's submission on general damages were without basis.

13. The Learned Magistrate erred in law and in fact in making a finding on general damages and basing it on a decision made in the year 1988 and estimating the rate of inflation instead of seeking other authorities provided by the appellant in determining the recent awards.

14. The Learned Magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters in making his award for general damages.

15. The Learned Magistrate erred in law and in fact in failing to finding that the respondent was entitled to special damages of Kshs.720,000/=

16. The Learned Magistrate erred in law and in fact in making a finding that Dr. Adede and Dr. Noorani's attendance fees of Kshs.8,000/= and Kshs.30,000/= respectively should be considered as costs.

17. The Learned Magistrate erred in law and in fact in awarding Dr. Adede and Dr. Noorani's attendance fee when the same was not pleaded.

18. The Learned Magistrate erred in law and in fact in generally making erroneous findings in the suit.

Accordingly, the appellant urged this court to vary the entire Judgment by setting it aside.

Background

The appellant in the primary trial at all material times, was the registered owner and/or beneficial owner or driver of motor vehicle registration number KBM 333U. While the respondent was on or about 25.8.2012 at Baobab area when he boarded the offending motor vehicle being driven along – Bofa Kilifi road when the appellant agent, driver or servant negligently managed, controlled the subject motor vehicle and caused it to lose control and overturn causing an accident.

As a result of the aforesaid accident, the plaintiff who was a lawful passenger sustained serious injuries. The particulars of negligence are as stated in paragraph 4 of the plaint.

By the same accident, the appellant filed his statement of defence. In particular, he denied any breach of statutory duties or wrongful acts of negligence in respect of the accident.

The trial commenced at Senior Principal Magistrate at Kilifi initially presided over by **Hon. Nyambu** but subsequently taken over by **Hon. Ondieki (SPM)**.

The respondent case was supported by two witnesses by way of witness statements and their evidence on oath.

In the evidence of **CPL Ronald Kimosop (PW 1),** attached to Kilifi Police Station who testified on behalf of **PC Boro** confirmed the said accident occurred involving motor vehicle Registration number KBM 333U and the plaintiff who was on board the said vehicle. **PW 1** further testified that the accident was self-involving and being driven by **Regina Nthuku**. He also told the court that in the accident the respondent who was one of the victims sustained personal injuries.

At the end of his evidence, PW 1 produced a police abstract and P3 Form as exhibit 1 and 2 in support of the fact that the accident occurred and the respondent suffered injuries.

PW 2, gave evidence directed at proving that he was a passenger in the appellant's motor vehicle which lost control along Bofa-Kilifi road due to overspeeding. PW 2 added that the appellant's driver who was unable to control the vehicle as she approached the corner did overturn and as a consequence those on board including himself suffered serious injuries involving fractures to the radius, humerus and ulna.

PW 2 further confirmed that following the injuries he was treated at Mombasa Hospital as supported with treatment notes exhibit 13 and cost of treatment which amounted to Kshs.871,300/=. The plaintiff however at the trial produced receipts as a bundle – exhibit 4 in support of Kshs.720,000/=.

He blamed the accident on negligent acts of the driver he identified as Regina Thuku.

With respect to further medical consultation, **Dr. Salim Noorani (PW 3),** an orthopedic surgeon gave evidence confirming having attended to (PW 2) who came in with a history of being involved in a road traffic accident. **PW 3** examined the plaintiff/respondent injuries and confirmed that he had undergone surgery to fix the fractures. Dr. Noorani pointed out that the plaintiff/respondent as at 27.12.2012 he had an elbow contracture which still was expected to achieve full recovery. The medical report and the consultation fee receipt of Kshs.30,000/= was admitted negligence as exhibit 3 and 8 respectively.

Apart from **PW 3**, **PW 4, Dr. Ajoni Adede** also testified as having been consulted by (PW 2) in regard to his injuries and mode of treatment. Dr. Adede told the court that PW 2 underwent surgery with fixation of metal implants to fix the fractures. According to Dr. Adede, the respondent recovered with residual effect of posttraumatic scars and permanent disability assessed as 18%. Dr. Adede further produced the medical report, receipts for his consultation of Kshs.2,000/= and court attendance charged at Kshs.8,000/=. Dr. Adede finally opined that the respondent will require surgery to remove the metal implants at Kshs.120,000/= at a later stage when full union is expected to take place.

At the close of the plaintiff's case, the record indicates that Learned counsel for the appellant sought an adjournment to call witnesses for the defence. That application for adjournment was objected to by the plaintiff/respondent counsel.

For the reasons adduced by the Learned trial Magistrate in his Ruling dated on 8/3/2018, an adjournment was declined and a direction given for parties to file written submissions and a Judgment date duly served upon the parties.

In the trial court, considered view, the plaintiff/respondent was awarded Kshs.1,500,000/= as general damages for pain and suffering and specials of Kshs.720,000/= plus costs and interest.

Being dissatisfied with this outcome, the appellant appealed on the grounds set out at the opening paragraph of this Judgment. The appeal was disposed of by way of written submissions.

The appellant counsel, **Mr. Okello** in his written submissions together challenged the Learned trial Magistrate findings in awarding the general damages for pain and suffering. In his submissions counsel argued that there was an error in the manner of appreciating the evidence beforehand that affected the final decision on damages.

Learned counsel pointed out that the appellant had sought an adjournment to challenge the respondent evidence but that chance was declined by the Learned trial Magistrate. Learned counsel submitted that there was a dispute with regard to treatment notes which the trial court was fully aware of as referred to by Dr. Noorani and Dr. Adede both on record as having been consulted by the respondent on diverse dates.

In essence Learned counsel urged this court to interfere with the Learned trial Magistrate findings in absence of resolving the issue on treatment notes. With respect to the award on general damages Learned Counsel cited the cases of **Namiluwa v Cheruiyot & another [2005] eKLR, Mary Muite v Joseph Katunge Muswi – Nakuru HCCC NO. 3214 OF 2000, Esther Kilime v Joseph Kilime 384 of 2000** for compensatable injuries to the respondent's claim.

Learned counsel contended that given the opinions in the medical reports by Dr. Noorani and Dr. Adede on the injuries sustained by the respondent an award of Kshs.500,000/= would have been appropriate for pain and suffering. In relation to the assessment on specials on medical expenses. The Learned counsel submitted that the appropriate amount calculated from the receipts admitted in evidence was Kshs.475,900/= and not Kshs.720,000/= awarded by the trial court. Further Learned counsel took issue with the findings by the trial Magistrate that the doctors' fees be compensated as part of costs to the claim.

The Learned counsel argued and urged this court to exercise the appellate jurisdiction to interfere with the entire award in the interest of justice.

According to **Mr. Otieno** Learned counsel for the respondent, submitted and manifestly differed with line of submissions by the counsel for the appellant. In his arguments, the evidence adduced and medical reports on the injuries, pain and loss of amenities is a clear support of all the material that was taken into account to assess general damages to Kshs.1,500,000/=.

According to Learned counsel there was sufficient evidence to inform the court on both general and special damages payable to the respondent. Learned counsel contended that the appellant/defendant had a chance to call witnesses to controvert the prima facie case established by the respondent but chose not to, rendering the trial Magistrate to proceed and pronounce Judgment on the matter.

It was also contended by the respondent counsel that issue of treatment was dealt conclusively by the witness testimony of PW 3 Dr. Noorani and PW 4 – Dr. Adede. On the principles enumerated in the authorities of **Denshire Muteti Wambua v KP AND L. CO LTD CA NO. 60 OF 2004, Mwaura Mulruiru v Suera Flowers Ltd & Another HCC 189 OF 2009** Learned counsel rooted for the Kshs.1,500,000/= be affirmed by this court on general damages for pain and suffering. While on special damages, Learned counsel submitted that it was specifically pleaded and specifically proved by the receipts admitted in evidence as exhibits which were never challenged by the appellant.

The Law and Analysis

The test to be applied in determining this appeal and on approaching this task is as set out in the principles stated in the cases of **Pandya v R 1957 EA.** In my view having considered the memorandum of appeal, the evidence in controversy between the parties herein, all will not be completely settled until I rule on

***(a)*. Whether the appellant/defendant right to a fair trial and due process was infringed by the Learned trial Magistrate.**

***(b)*. Whether the defendant/appellant herein was vicariously liable in negligence for the acts of his agent, servant, employee or driver of motor vehicle registration KBU 333 U in traffic accident which occurred on 25.10.2012.**

***(c)*. Whether, based on the findings on liability, what measure of damages are awardable to the plaintiff for pain and suffering, loss of amenities, and further on specials as a consequence of the damage and loss suffered due to the negligent acts of the defendant.**

***(d)*. Whether, who is liable to meet the costs of the suit?**

ISSUE NO. 1

In adjudicating the issue on the right to a fair hearing, the court must first satisfy itself of the provisions under Article 50 of the constitution on fair trial rights and due process. The right to a fair hearing under our constitution though textured to encompass criminal justice administration, the essentials of it have right to equal access to court, equality before the law, the right to legal representation, the right to adduce and challenge evidence; the right to have one's case decided without undue delay, the right to an independent and impartial tribunal.

The right to a public hearing apply **Mutati's Mutandi's** to civil administration of justice.

In Article 25 (c), the constitution of Kenya contains an explicit mention that the right to a fair hearing shall not be limited. The broader concept of the right to a fair trial both under the constitution and the Civil Procedure Act and rules are said to encumbers various elements like access to justice, right to a proper preparation of a case for trial, the necessary process and procedural guarantees necessary for the court to administer proper justice.

The thrust on a right to a fair hearing is embedded with the doctrine on judicial discretion exercised as provided for under Article 50 (1) of the Constitution. In this regard, the right to a fair trial and due process of the law in Civil cases depending on the set of the circumstances may be curtailed by striking a balance between access to court and effective protection of individual rights. I have in mind the provisions in the Civil Procedure Act and Rules on summary Judgment where a motion to move the court is filed to dispense the requirement of a trial pertaining to the facts of the case.

I must say that the principle is the bedrock for ensuring fairness in the administration of justice. In addition, Article 14 (1) of the **ICCPR** expressly entitles everyone to a fair trial and public hearing in consonant with other Article 50 (1) of the constitution.

The commentary to this doctrine in conjunction with the right to a fair hearing most demanded in the adversarial judicial system. In furthering the dictates of the constitution and overriding objective in terms of Section 1 A and B of the Civil Procedure Act, the trial court must strike a balance between the claimants demanding that they may be accorded substantive justice and procedural equality.

Judicial power in the Constitution is based on several Articles of the constitution, for purposes of this discussion (make reference to Article 159 (a) which provides interlia ***" Justice shall be done to all irrespective of status."*** (b). ***"Justice shall not be delayed."*** (d)***."Justice shall be administered in the courts in a manner provided for in this constitution save that it shall be administered to advance substantial justice."***

It is established that the right to a fair trial is a fundamental human right recognized in various international instruments and treaties which from part of our Law as laid down in Article 2 (5) of the Constitution. The language as to the rights to a fair hearing in both Criminal and Civil administration of justice is found in the universal Declarations of Human Rights of [1948], (Article 10), the international convenient on civil and political rights (Article 14) and the African Charter on Human and peoples Rights [1981] (Article 7) just to mention but a few of the treaties and convention.

Though the provisions of Article 50 of the Kenyan Constitution on the core of the right of it does not mention the word civil. It is easily deducible what yields right to a fair hearing in civil cases. There is in my opinion the right of access to a court and right to be heard by a competent, independent and impartial tribunal 50 (1), the right of equality of arms in Article 27 (1), the right to legal counsel of one's choice (Article 50 (2) (g), Right to adduce and challenge evidence 50 (2) (k), to have the trial begin and concluded without unreasonable delay.

The whole tenor of the right to a fair hearing as envisaged by our constitution is that for fair administration of justice to be achieved. Every person ought to be treated fairly by an independent court or tribunal.

In the case before me, the rules applicable to the administration of civil justice are extensive as can be clearly seen within the provisions of the civil procedure Act and Rules 2010. It is evident from the content of the Civil Procedure Act and rules that right to a fair hearing and due process is embodied with regard to protection of the rights of the parties to the trial. As demonstrated above, any civil or criminal proceedings is generally considered fair if the parties have been given an opportunity to be heard by adducing and challenging evidence on the disputed facts.

In this connection, I agree with the principles in the persuasive authority by the English Court of Appeal in **Cozens v North Devon Hospital Management Committee and another [1966] 2 ALL ER 799** where **Salminja** in advisory Judgment stated

> ***"I start from the point that the general rule of the law is that the courts will not make orders, in right proceedings affecting a party's rights without giving that party an opportunity of being heard. To my mind very clear words would be required to take away fundamental rights which are ordinately accorded by the law and indeed by Court of justice."***

In furthering the dictates of the constitution on fair trial rights, in the administration of civil justice Section 1A of the Act on overriding

objective, the court has to strike a balance to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes, governed by this Act. Subject to certain well known principles a party claiming infringement of a right to a fair hearing and due process is enjoined to provide such evidence to satisfy the court that the circumstances of the trial were unfavorable for him to present his case. In the case of **Republic v Kenya Power & Lighting Company Limited & Another [2013] eKLR** where the court observed that:

> ***"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."***

I therefore, pause the question whether the appellant rights to a fair trial and due process were infringed by virtue of being denied a further adjournment by the trial court.

One of the key grounds on which Learned counsel submitted on this issue was in regard with non-availability and admission of treatment notes of the respondent.

The record of the trial court shows clearly that the suit by the respondent was instituted in 2014 and the appellant entered appearance on 6.10.2014 and thereafter filed the statement of defence on 27.11.2015. There are no alternative of documentary evidence nor list of witnesses and their respective statements intended to be called in answer to the claim by the respondent on compliance with Order 11 of the Civil Procedure Rules a pre-trial conference was held on 26.4.2015 as part of the case management scheduling on filing and exchange of witness statements, documentary evidence, discovery, agreed issues, trial certainty and adopted mode of disposal of the case.

What followed after the pretrial conference as reflected from the record are several adjournments by both counsels on behalf of the parties. The trial finally commenced on 28.9.2016 until the 7.3.2018 when the respondent closed his case. Some of the key witnesses at the trial were the two medical consultants Dr. Ndegwa (PW 3) and Dr. Adede (PW 4) who examined and treated the respondent.

In their respective testimonies each one of them was categorical that the findings in the medical reports was from the history of the patient, review of the medical records, their own physical examination and management of the respondent. It is clear from the evidence that the appellant had not complied with the order on filing of the witness statements at the earliest opportunity before the commencement of the trial. Notwithstanding, that default he still sought an adjournment to call evidence for the defence. As we have said the parties' opportunity to be heard must come with the sense of responsibility and accountability rooted in the administration of justice.

The concern here is not whether the decision of further adjournment was denied but is whether in making the decision the Learned Magistrate acted judiciously and reasonable. The answer to this question is found in the ruling by the Learned Magistrate where she held as follows:

> ***"I have not been told why the documents were not filed and served on the other party as per the provisions of the Law. The defence therefore is in breach of Order 11 of the Civil Procedure Rules and cannot be allowed to circumvent the law. Clearly the plaintiff is in the dark as to what evidence the defence will offer now that the plaintiff has closed his case and will not be able to comment on it. In the circumstances, I decline to grant an adjournment to the defence on that ground."***

This is the order which eventually was to form part of the ground of the instant appeal against the respondent. It should be noted from the record the appellant was accorded adequate time and facilities to prepare to adduce evidence and challenge the case by the respondent. The right to adduce and challenge evidence under Article 50 (2) (k) of the Constitution applies **Mutati's Mutandi's** in civil justice administration.

In all the circumstances efficiency of the administration of justice is premised in the doctrinal principle of justice to be delivered expeditiously and within a reasonable time. That in view of this case, exercise of discretion the trial court had to strike a balance on the principles espoused on overriding objective in Section 1A of the Civil Procedure Act.

In the instant case, the claim was filed way back in 2014 only to be concluded in 2018. The appellant was full aware of the legitimate procedural and substantive obligations and their importance to the fair administration of justice. While the primary target was on treatment notes its probative value was captured very clearly in the testimony by Dr. Noorani and Dr. Adede who physically examined and treated the respondent. Their testimony can only be challenged by another expert, knowledgeable in the science of medicine. Apart from the evidence of the respondent, the appellant filed no request for another medical report besides that of the two consultants to challenge their findings and opinion.

My decision, is that the decision by the Learned trial Magistrate to decline further adjournment cannot be faulted either on excess of jurisdiction or on irrationality. Accordingly, this ground fails.

Issue no. 2: liability

The present state of the Common Law on causation is as found the case of **Leyland Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350, at page 369** where the court held:

> ***"Causes are spoken of as if they were as distinct from one another as beads in row or links in a chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."***

The duty to drive with reasonable care and attention is provided for under Section 47 and 49 of the Traffic Act Cap 403 of the Laws of Kenya. This duty of a driver was clearly stated in the persuasive case by the Supreme Court of Jamaica in **Cecil Brown v Judith Green and Ideal Car Rental** stated as follows:

> ***"It is clear that there is, indeed a common law duty as well as statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident."***

Applying the above principles, from the evidence of both PW 1 Corporal **Ronald Kimosop** and PW 2 **Danson Neil Kusumo** two vital facts emerged:

First, the respondent was a passenger on 25.8.2012 in the motor vehicle being driven by **Regina Mbithe** who was stated to be an authorized driver or agent of the registered owner namely **Dennis Kaveke** the appellant to this appeal.

Secondly, the events leading to the accident were in the control of the driver or agent to the appellant.

Thirdly, the situational analysis shows that the vehicle lost control as the driver was making attempt to negotiate a bend along **Baobab – Bofa** road in Kilifi County. When the car was taken for inspection, there were no pre-accident defects which could have contributed to the accident. I am therefore, in agreement with the Learned Magistrate the cause of the accident was wholly on the negligence and manner of driving of the driver to motor vehicle KBM 333U. It therefore, dawns on me beyond question that the accident was not in anyway contributed to by the respondent.

Issue No. 3

At the heart of this appeal lies the assessment of general and special damages for the respondent by the Learned trial Magistrate. As to the issue on general damages the trial court assessed them at Kshs.1,500,000/= whereas special was assessed at Kshs.720,000/=.

Under, the head on general damages, Learned counsel for the appellant submitted and contends that although the respondent was entitled to damages for pain and suffering but the final award was excessive and manifestly exaggerated, he cited various authorities to persuade this court that an award of Kshs.500,000/= under this head would have been fair, just and appropriate to the injuries.

The respondent counsel would not entertain that line of submissions. He also submitted that according to the plaintiff evidence and the medical reports of Dr. Noorani and Dr. Adede, the sum so considered was fair and reasonable.

On assessment of damages he urged the court to be guided by the principles laid down in various decisions. In the case of **Mohammed & Another v Sahiro Bandit Mohamed CA NO. 30 OF 1997.**

The court quoting from the principle in **Kigaragani v Aya [1982 – 1988] IKAR 768** held that:

> ***"Damages must be within limits see by deciding cases and also within limits the Kenya economy can afford. Large awards are inevitably passed on to the members of the public the vast majority of whom cannot afford the burden in the form of increased cases for insurance and increased fees."***

Having said so as rightly pointed out by **Lord Morris of Borth – Y- Gest** in the case of **West (H) & Son Ltd v Shephard [1964] AC 326** where he held that –"***money cannot renew a physical frame. That has been battered and shattered. The tendency of the courts is to award such sums which must be regarded as growing reasonable compensation, for loss of an organ or limbs***."

In applying the above principles and the issues raised by the appellant against the award I rely on the passage in the cases of **Salini Zein & Another, Rose Mulee Mutua Civil Appeal No. 147 of 1994 and Kemfro Africa Ltd v A. N. Lubia & Olive Lubia [1988] IKAR 727** the legal cannons in these cases answers to the question in which an appellant must show and satisfy this court that the trial Magistrate in assessing the damages took into account an irrelevant factor, or left out a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

In the instant appeal the respondent gave evidence and produced several documents in court showing that he was admitted at Mombasa Hospital on the basis of the injuries suffered during the accident. The X-ray taken on 27.8.2012 and showed a bend shaft fracture of the right humerus right radius forearm and right ulna forearm bones.

With regard to Dr. Adede who examined the respondent stated in his report dated 8.7.2013 that multiple right upper hand fractures, deformity of the right elbow stiffness, weakness in the fractures area could be noticed. Further the metal plates implants will require removal after 2 years at a cost of Kshs.120,000/=. He also assessed permanent disability at 18%. Dr. Noorani also stated in court that in an earlier report dated 27.12.2012 he confirmed the fractures of humerus and ulna, but he was not able to give a conclusive opinion because the healing was on-going. At that moment he could not state with certainty how long it would take to attain full recovery.

However, on this evidence, the latest report by Dr. Adede is clear as to the nature of injuries, recovery and degree of permanent disability. Thus having given consideration to all the facts, evidence and submissions on appeal its incumbent to determine whether the award was inordinately punitive and exaggerated?

The cases referred to by the respondent counsel before the trial court are as follows: **Denshire Muleli – Wambua v KP - & L Co. Ltd CA NO. 60 OF 2004** for injuries to the right and left femur, dislocating the left radius and Linate bone. Fracture of the xapilla bone. The Court

of Appeal awarded Kshs.1,500,000/=, **Vincent Kirima v South Nyanza Sugar Co. Ltd CA No. 281 of 2006** for injuries involving captured fracture of the left tibia, fracture of the ulna, cut wound and bruises. Hospitalized for 2 months and covered treatment as outpatient. The court awarded general damages of Kshs.700,000/=. **Mwaura Muthaura v Suera Flowers Ltd HCC NO. 189 OF 2009** for injuries sustained to the commuted fracture of the right humerus upper and lower 1/3 compound double fractures of the right leg upper and lower 1/3 libia and fibula multiple lacerceous on the face and soft tissue on the chest. The injuries healed with permanent disability assessed at 50% for loss of right arm and 20% for the left leg.

The respondent counsel in his submissions on appeal relied on the principles on these cited authorities for plea that there is no new material or evidence upon which this court can interfere with the award.

The appellant counsel rooted for an award of Kshs.500,000/= placing reliance on the case of **Nandwa v Cheruiyot (supra).**

As it is demonstrated the respondent suffered serious injuries as detailed in the documentary evidence from Mombasa Hospital, Nairobi Hospital and a further medical follow up by Dr. Noorani and Dr. Adede.

The court is also enjoined so consider at the circumstances of the case, more specifically whether non-production of treatment notes occasioned prejudice or injustice to the final Judgment. I believe there is some support for my view on this issue in the case of **Ndurya v R CA NO 446 OF 2007** where the court held that circumstantial evidence is more often the best evidence on the surrounding circumstances in which extensive examination is capable of accurately proving a proposition or fact in issue.

It is apparent from the record before the trial court that PW 1 and PW 2 gave evidence which was credible and which was supported by medical evidence from Mombasa Hospital on hospitalization of the respondent. The injuries noted on the respondent were consistent with the findings made by Dr. Noorani and Dr. Adede. As to the particular issue on the date in the treatment notes, even if it was to be availed without undue delay to the proceedings the fact that on 25.8.2012 an accident occurred involving motor vehicle KBM 333U in which the respondent was a lawful passenger cannot be changed. Therefore, I find that the trial court had clear evidence on record as a basis from which to draw the conclusions on the time and date of occurrence of the accident in question.

Turning to the issue on general damages, I bear in mind the authorities cited by both counsels, medical evidence and prognosis made by the respective consultants. The jurisdiction of this court to disturb any award of a trial court is now well settled as stated in the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros –vs- Augustine Munyao Kioko C.A. No. 203 of 2001** where the Court of Appeal while citing the case of **H. West & Sons Limited –vs- Shepherd [1964] A.C. No. 326** held:

> ***"That 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 of 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 he himself would have made. Having done so and remembering that in this sphere there are inevitably difference 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."***

I have reviewed the powerful submissions singled out by the appellant counsel on the assessment of damages for pain and suffering with loss of amenities on the part of the respondent. The facts and the principles in similar words as placed before me by both counsels has also been taken into account.

What has emerged is the fact that the Learned Magistrate assessment happens to be on higher scale of the pendulum though the respondent suffered grievous harm. The assessment of Kshs.1,500,000/= ought to be interfered with for being erroneous. The case of **Namulwa** was decided way back in 2005. On the contrary to the respondent counsel, the case of **Denshire Wambua** depicts more grave injuries compared with that of the respondent.

On my part, I reassess general damages at Kshs.1,000,000/= for pain and suffering. The appeal on this ground partially succeeds.

Issue No. 4

The other ground on this appeal is in respect of special damages. It is trite that once a litigant sues for special damages he must understand that they must provide cogent and credible evidence of proof that he has suffered special damage and the associated quantum thereof.

The Law as to the principles applied regarding special damages is now well settled in **Shaguille Forbes v Raiston Baker et al JIMC 2006** The court stated:

"It is not enough to write down particulars and so to speak throw that at the head of the court saying this is what I have lost I ask you to give me these damages. They have to prove it."

In **Cecilia Mwangi & Another v Ruth Civil Appeal No. 251 of 1996 OR** The Court of Appeal had this to say

> ***"Special damages claim must be specifically pleaded and strictly proved. The plaintiff cannot just throw figures at the Judge and ask him to assess such damages (see also Kenya Bus Services Ltd v Mayende 1991 ZKAR ZR -235.)***

The appellant counsel in this case submitted on the special loss suffered as a result of the accident and contended that the bundle of receipts

did not strictly proof the claim of Kshs.720,000/= as decided by the Learned trial Magistrate.

Having considered the trial court record more so (PW 2) testimony and documentary evidence in support of special damages, the correct test to be applied under this head is whether the plaintiff specifically pleaded Kshs.720,000/= or some other quantum.

I have scrutinized and evaluated the various receipts the respondent produced before the trial court to proof quantum on specials. Although the appellant counsel seems to submit otherwise, there is sufficient material to not only prove specials pleaded in the plaint but the available receipts totals to a figure of more than Kshs.720,000/= if in my view the calculations done by this court is anything to go by.

However, for purposes of this appeal it will suffice to interfere with the award of Kshs.720,000/= as being erroneous and substitute with a correct amount duly pleaded of Kshs.871,300/= and strictly proved by evidence admitted by the trial court. I think therefore on this aspect the Learned Magistrate was in error and accordingly set aside the original award of Kshs.720,000/ by substituting it with Kshs.871,300/= in lieu of prima facie evidence offered at the trial by the respondent.

Finally, I revert now to the issue which has been raised in regard to witness expenses incurred in securing Dr. Noorani and Dr. Adede to avail themselves to testify on behalf of the respondent.

It is not disputed that such expenses are recoverable from the appellant as part of the costs of the litigation. It is apparent therefore, that the Learned trial Magistrate had not appreciated the provisions of the Advocates Remuneration Order. I am in agreement that the amount be part of party and party bill of costs guided by the provisions of Advocates Remuneration Order.

As I have attempted to demonstrate in my opinion the approach taken by the Learned trial Magistrate landed him into an error of fact and principle that standing back and looking at his award it was excessive and exaggerated. The result was that it was for interference from this court by substituting it with Kshs.1,000,000/= in place of Kshs.1,500,000/=.

On specials, I disagree with submissions by the appellant counsel that the sum proved was Kshs.475,000/= from the quantum specifically pleaded of Kshs.871,300/=.

I have had a second look at the bundle of receipts, applying the mathematical formulae of addition, they are very clear to be above the pleaded amount in the plaint. Hence, I settled for the pleaded amount of Kshs.871,300/= in favor of the respondent.

That being my view of the appeal, I order that the appeal be and is hereby allowed to the extent so ordered herein on general and special damages. Accordingly the appeal therefore is allowed in the following terms:

(a) Liability at 100% in favor of the respondent.

(b) General damages Kshs.1,000,000/=

(c) Special damages Kshs.871,300/=

(d) The cost of this appeal be equally shared by the appellant and respondent

(e) The interest on specials be calculated from the date of filing suit whereas general damages from the date of Judgment of the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE