REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO. 7 OF 2019

(FORMERLY ELDORET HCCA NO. 116 OF 2016)

ISAAC K. CHEMJOR.....1ST APPELLANT

PETER KEMBOI.....2ND APPELLANT

=VERSUS=

LABAN KIPTOO.....RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kabarnet

PMCC. No. 33 of 2014 delivered on the 26th day of June, 2016 by Hon. S.O. Temu, PM)

JUDGMENT

1. By a Plaint dated 17th December 2014, the respondent herein sued the appellants and pleaded his cause of action as follows:

> "***PLAINT***
>
> *1. The Plaintiff is an adult residing and working in Kabarnet. His address for service for the purpose of this suit is care of M.K. Chebii & Co. Advocates, Jeevan Bharati Building Sixth Floor, Harambee Avenue, P.O. Box 54555-00200 Nairobi.*
>
> *2. The 1st and 2nd defendants are also adults of sound mind residing and working for gain in Kabarnet aforesaid. Service of summons upon the defendants will be affected through the plaintiff's advocates office.*
>
> ***3. At all material times to this suit the 1st defendant was the registered owner of motor vehicle registration number KAW 164Y while the 2nd defendant was his driver, servant and/or agent.***
>
> ***4. On or about the 22nd December 2011, the plaintiff was lawfully travelling as a passenger in motor vehicle registration number KAW 164Y along Nakuru-Ravine-Marigat road when the 2nd defendant so negligently and recklessly drove the said motor vehicle at a very high speed that he caused it to loose control, veer off the road and overturn thereby causing serious injuries to the plaintiff.***
>
> ***PARTICULARS OF NEGLIGENCE OF THE 2ND DEFENDANT***
>
> *i) Driving at a very high speed in the circumstance.*
>
> *ii) Driving without due care and attention.*
>
> *iii) Failing to stop, slow down, brake, swerve and/or manage the said vehicle so as to avoid causing the said accident.*
>
> *iv) Failing to observe the traffic rules.*
>
> *v) The plaintiff shall rely on the doctrine of Res Ipsa Loquitor.*

5. <u>As a result of the accident the plaintiff sustained serious injuries and has suffered loss and damage.</u>

<u>PARTICULARS OF THE PLAINTIFF'S INJURIES</u>

a) Left hip fracture.

b) Right mid temporal tube area brain contrusion.

c) Head injury.

d) Soft tissue injuries.

<u>PARTICULARS OF SPECIAL DAMAGES</u>

i) Medical report……..Ksh.3500/=

ii) Medical expenses to be stated.……

<u>And the plaintiff claims general and special damages.</u>

6. <u>The plaintiff holds the 1st defendant vicariously liable for the actions of the 2nd defendant.</u>

7. Despite demand made and notice of intention to sue having been given the defendants have refused and/or neglected to compensate the plaintiff.

8. There is no other suit or previous proceedings pending in any Court over the same subject matter between the plaintiff and the defendants.

9. The plaintiff and the defendants reside at Kabarnet within the jurisdiction of this honourable Court.

***<u>REASONS WHEREFORE</u>** the plaintiff prays for judgment to be entered against the defendants jointly and severally for:*

a) <u>General damages.</u>

b) <u>Special damages.</u>

c) <u>Cost of the suit.</u>

d) *<u>Interest on a, b and c above."</u>*

2. The suit was defended by the appellants by a Defence dated 3rd March 2015, in material parts, as follows:

"<u>1ST & 2ND DEFENDANTS' WRITTEN STATEMENT OF DEFENDANT</u>

3. Without prejudice to anything contained herein, the 1st and 2nd Defendants state that the Plaintiff's suit filed herein is fatal, inept, incompetent and ambiguous and does not sufficiently disclose the material particulars and may therefore be struck out on these grounds.

4. The Defendants refers to paragraph 3 of the Plaint and the 1st Defendant denies being the registered owner of motor vehicle registration number KAW 164Y at all material times to the suit or at all, and the 2nd Defendant denies being the 1st Defendant's driver, servant and/or agent at all material times to the suit or at all, and the Plaintiff is put to strict proof thereof.

5. The 1st and 2nd Defendants therefore deny the contents of paragraph 4 of the Plaint that on or about the 22nd day of December, 2011, the Plaintiff was lawfully travelling as a passenger in motor vehicle registration number KAW 164Y along Nakuru-Ravine-Marigat Road, or that the 2nd Defendant so negligently or recklessly drove the said motor vehicle at a very high speed, or that he caused it to lose control, veer off the road or overturn thereby causing serious injuries to the Plaintiff and the Plaintiff is put to strict proof thereof.

6. The 1st and 2nd defendants therefore vehemently deny in toto the particulars of negligence contained in paragraph 4 of the Plaint or elsewhere and invites strict proof from the Plaintiff.

7. The 1st and 2nd Defendants further deny the particulars of injuries set out in paragraph 5 of the Plaint as well as the particulars of special damages in toto and the Plaintiff is put to strict proof thereof.

8. Without prejudice to the foregoing the 1st and 2nd Defendants aver that if at all an accident occurred as alleged or at all, which is denied, and if at all the Plaintiff sustained injuries as alleged, which is also denied, then the same was caused solely and/or substantially contributed to by the Plaintiff's own acts of negligence.

PARTICULARS OF THE PLAINTIFF'S NEGLIGENCE

a) Failing to have due regard for his own safety.

b) Failing to use or fasten the seatbelt on himself as required by law.

c) Distracting the driver.

d) Being generally careless and negligent.

e) Res ipsa loquitor.

9. The 1st and 2nd Defendant refers to paragraph 6 of the Plaintiff and denies being vicariously liable for the actions of the 2nd Defendant and the Plaintiff is put to strict proof of these allegations.

10. The 1st and 2nd Defendants deny ever receiving or being served with any demand or notice of intention to sue as alleged in paragraph 7 of the Plaint and put the Plaintiff to strict proof of the allegation.

11. The 1st and 2nd Defendants are strangers to the contents of paragraph 8 of the Plaint that there is no suit pending neither have there been previous proceedings in any Court between the Plaintiff and the Defendants over the subject matter of this suit, and the Plaintiff's put to strict proof thereof.

12. The jurisdiction of this Honourable Court is admitted.

***REASONS WHEREFORE** the 1st and 2nd Defendants prays that this suit be dismissed with costs."*

Liability

3. In his judgment delivered on 27th July 2016, the learned trial magistrate held at p.19 thereof found liability established against the appellants as follows:

*"**Judgment p.19***

I have considered the above submissions on liability and upon reading the evidence tendered by the plaintiff and considering of the above cited authorities. I do make the findings hereunder:

In the instant case the plaintiff was a passenger in the 1st defendant's evidence. The plaintiff testified and he produced a police abstract as exhibit P5 which indicated that the plaintiff was passenger in the suit motor vehicle Registration Number KAW 164Y and the 2nd defendant was the driver on the date of accident.

In the case of Grace Kanini Muthini –VS- Kenya Bus Service as cited in Mmbula Charles Mwalimu –VS- Cost Broadway Company Ltd: The plaintiff had died: which meant that the plaintiff's case was supported by the police abstract without any testimony from any witness to support what was on the police abstract by a police officer who was not at the scene.

But for the instant case, the plaintiff testified before Court, he was cross examined and he repeated the same story/evidence. The P3 and police abstract confirmed that indeed the plaintiffs evidence was true: I also believed the plaintiff's testimony when he testified as he could not speak well and was plain in answering questions as to what had happened.

I thus do find that the instant case's circumstances are not similar to the cited case and I thus find that the plaintiff had cleared all doubts as to what had happened and the defence had failed to say anything to the contrary. The plaintiff had thus successfully proved his case on a balance of probabilities as require.

The plaintiff was passenger, he had put on his safety belt and it was the 2nd defendant who was the sole contributor of the accident motor vehicle.

There was nothing that the plaintiff could have done to prevent the accident but the defendant had.

I thus find no reason to a portion liability as against the plaintiff as urged by the defence without an evidence.

I thus find that the plaintiff was not to blame and I hold the 2nd defendant 100% liable for the accident and the 1st defendant vicariously liable as he was the owner of the suit motor vehicle."

Quantum of damages

4. As regards Quantum, the trial Court awarded general and special damages at p.25 et seq. of the Judgment as follows:

> *"I have considered the injuries suffered after the medical report adduced together with the cited case and I do make a finding as hereunder:*
>
> *As in the case of Rosemary Wanjiku Kingu –vs- Elijah Macharia Githinji & another 2014 KLR.*
>
> *"In awarding damages the general picture, the whole circumstances and the extend of the injuries on the particular person concerned must be looked at, some decree of uniformity must be sought and the best guide in this respect is to have regard to recent awards in comparable cases in local Courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.*
>
> *The Court has to strike a balance between endeavoring to award the plaintiff a first amount, so far as money can ever compensated, and entering the reasons of very high awards which can only in the end have deleterious effect"*
>
> *The above is the spirit I have employed to assess damage herein.*
>
> *The plaintiff had suffered fractures which were united with plates which were still in his body at the trial: the injuries were to the hip and had a future effect of early osteoarthritis of the hip joint.*
>
> *The plate was to be removed later on.*
>
> *The plaintiff had also suffered loss of memory and slurred (stammering) speech which was to affect his academic as per the doctor's report and the Court had the benefit to hear the plaintiff speak and it was clear that it was stammering.*
>
> *His injuries were given permanent disability of 40% which meant that he will never be the same ever.*
>
> *The plaintiff's advocate's proposal was whoever on the higher side and the cases cited were of more severe injuries than the case at land.*
>
> *The defendant's advocate cited relatively cases with similar injuries though old and had no future permanent disability assessed.*
>
> *I will thus award the plaintiff Ksh1.5 million for general damages for the injuries suffered and disability assessed.*
>
> *It will also award Ksh.300,000/= for future medication after doctor's report.*
>
> *On special damages the plaintiff pleaded for 782,255/= and the same was proved and I award the same.*
>
> ***I thus enter judgment against the defendants jointly in favour of plaintiff as hereunder:***
>
> ***Liability – 100%***
>
> ***G.D – 1.5 million one million five hundred.***
>
> ***Future medication 300,000/=.***
>
> ***Special damages 782,255/=."***

Submissions

5. Counsel for the parties filed respective submissions on the appeal. For the appellant, by Submissions dated 30th July 2019, it was contended that the respondent had not established liability on the part of the 2nd appellant as follows:

> *"**Issues for Determination***
>
> *Your Ladyship, we humbly submit the following as the issues for determination in this suit:*
>
> ***1. Whether the Respondent proved liability on a balance of probability at 100% as against the Appellants as awarded by the Trial Court.***
>
> *Your Lordship, the Appellant humbly submits that the Respondent did not prove that the Appellants were negligent to warrant liability be awarded at 100% as against the Appellants. The evidence adduced did not prove that the Appellant was entirely to blame*

for the accident. The respondent testified to the extent that the 2nd Appellant was evading another vehicle which resulted in the accident. During cross examination the Respondent further testified that he was uncertain as to the speed the vehicle was moving as he was not the driver on the material day. Considering the evidence and testimony on record, the Appellant submits the trial Court erred in finding the Appellant 100% liable for the accident.

Your Lordship, this Court is well bestowed with the jurisdiction to reconsider the evidence which went 'unappreciated' by the learned trial Judge. In the case of ***Kiruga vs. Kiruga & Another (1988) KLR pg. 348*** *as cited in* ***Timsales vs. Simon Kinyanjui Nakuru Civil Appeal No. 103 of*** *2003 it was held that an appellate Court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand…In* ***Mohamed Athman Kombo v Maua Mohamed [2019] eKLR*** *wherein the Court held that:*

"I have given due consideration to the record of appeal, as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

The Appellants further submit that the Respondent failed to prove his case to the required standard to warrant such finding on liability. In the case of ***Grace Kanini Muthini vs Kenya Bus Service Ltd and Another HCC 4708 of 1989*** *as cited in* ***M'Mula Charles Mwalimu v Coast Broadway Company Limited [2012] eKLR****, Justice Ringera (as he then was pointed out as follows:*

"On liability, the Plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document does not improve the case of the plaintiff. It was on the plaintiff…to prove her case on a balance of probabilities. …it is entirely probable that the accident was caused by the negligence of the second defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience. I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than that the second defendant wholly or partly contributed to the accident. There is no evidence. In the premise, I must, not without a little anguish, dismiss the Plaintiff's suit on the ground that fault has not been established against the defendants…."

Your Lordship, in a claim for negligence it is incumbent upon the Plaintiff to show that the defendant was in breach of a duty owed to them. In the instant appeal, the 2nd Appellant did everything within his control to avoid colliding with another vehicle. As such, we submit that the 2nd Appellant's action on the day of do not show any negligence on his part. In ***Michael Kariuki Muhu v Charles Wachira Kariuki & another [2015] eKLR***

"In this case, the appellant failed to prove that the 1st respondent failed to do what a reasonable person taking reasonable precautions would have done or did that which a person taking reasonable precautions would not have done. See the case of proprietors of the Brirmingham Water Works, VOL CIVIL ER 1047 at page 1049 (Alderson B). From the 1st respondent's testimony, I decipher that he took reasonable precautions to ensure that the appellant was not hit by the motor vehicle otherwise the injuries sustained would have been more serious.

It is not enough that the 1st respondent was on the road and that his motor vehicle came into contact with the appellant. It is sufficient that the 1st respondent took evasive measures necessary to eliminate the risk of crushing the appellant who, in my view, is lucky to be alive, credit to the 1st respondent being vigilant and avoiding him.

From the above exposition. I find that the appellant failed to prove his case on liability against the respondents on a balance of probabilities and I therefore see no ground upon which I can interfere with the trial Magistrate's findings and I accordingly uphold the trial Magistrate's decision dismissing the appellant's suit/claim against the respondents"

2. Whether the learned trial Magistrate erred in law and fact in adopting the wrong principles in awarding general damages considering the injuries sustained by the Respondent.

Your Lordship, the Appellant humbly submits that the learned trial Magistrate erred in law and fact in adopting the wrong principles in awarding general damages considering the injuries sustained by the Respondent. We therefore make the following submissions on quantum (without prejudice to our submissions on liability hereinabove).

This in our humble submission underscores the innocuity of the Respondent's injuries for which we submit that an award of ***Kshs.800,000.00*** *would be a fair requital. It is a well-established principle that in suits brought in respect of bodily injuries, the measure of damages is governed by the principle of restitutio in integrum, that is; an award for bodily injuries is intended to be compensatory in nature such that the Plaintiff should receive in monetary terms no more and no less than his actual loss. This principle was endorsed by Lord Morris in the locus classicus of* ***West (H) & Son Ltd. vs. Shepherd (1964) A.C. 326 at page 345*** *as follows:*

"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 an endeavor to secure some

uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said still must be that amounts which are awarded are to a considerable extent conventional."

*Further in **LimPoh Choo vs. Camden and Islington Area Health Authority (1979) 1 All ER 332**, Lord Denning M.R. aptly set out as follows:*

"In considering damages in personal injury claims, it is often said: "the Defendant are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error much as may befall of us. I stress this so as remove the misapprehension, so often compensated for all the loss and detriment she has suffered. That is not the law she is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the Defendants."

A cardinal rule of pleading is that a party is bound by pleadings. On that premise, we submit that the assessment of damages in this case must be by reference on the particulars of injuries as enumerated in the Plaint. The Plaintiffs/Respondent's injuries as pleaded were:

a. Left hip fracture.

b. Right mid temporal tube area brain contrusion.

c. Head injury.

d. Soft tissue injuries.

*Your Lordship, the award by the learned trial Magistrate is inordinately high considering the injuries sustained by the Respondent. This Honourable Court is espoused with power to review and set aside an award that is inordinately high in the circumstance. In **Joseph Wambura v Joseph Mwangi OBAI [2018] eKLR** the Court held that:*

"The Court of Appeal in the case of Kemfro Africa Limited t/a Meru Express Services (supra) discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

"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 that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

*We are also guided by the Court of Appeal in **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR** where it was held that:*

"…inordinately high awards will lead to monstrously high premiums for insurance of all sorts and it is to be avoided for the sake of everyone in the Country…"

*In the premises, **we reiterate our submission that an award of 800,000.00 would fairly and adequately compensate the Respondent** considering the nature of his injuries. The essence of damages would be defeated if any higher award on general damages were made herein. Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive. In particular, Courts have stated as follows:*

"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. See the case of Osman Mohammed & Ano. Vs Saluro Bundit Mohammed Civil Appeal NO. 30 of 1997."

We respectively draw the Court's attention to the following cases, which in our submission are instructive in the assessment of damages herein given the fact that they involve injuries analogous to the Respondent's herein. These decisions clearly underline the reasonableness of our submissions herein, particularly on quantum.

*1. **Gerald Ireri Harrison & 2 others v Danson Ngari [2018] eKLR** where the Plaintiff suffered a Compound depressed fracture of the skull on the right frontal region of the head and mild traumatic brain injury. The Court set aside and substituted an award of Kshs.2,000,000/= with Kshs.800,000/= as general damages.*

*2. **David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR**. The Court awarded Kshs.630,000 where the Plaintiff sustained dislocation of the right hip joint and fracture of the right femur bone.*

Future medical

Your Lordship we humbly submit that the learned trial Magistrate erred in law and fact in awarding future medical expenses and the same was not pleaded. It is trite law that parties are bound by their pleadings. Further, future medical expenses are specific damages. Specific damages must not only be specifically pleaded must specifically be proven. The Respondent did not plead for future medical expenses in either the Plaint or Amended Plaint. In ***Margaret Mumbua Mbithi v A.S.K. Sanghan & another [2016] eKLR*** *the Court held that:*

"On consideration the appellant injuries could have attracted an award of between Ksh.200,000/= to 250,000/= for pain and suffering. The appellant failed to specifically to plead for future medicals and the learned trial Magistrate was correct in dismissing the claim."

CONCLUSION

Your Lordship, in light of the foregoing, we humbly submit that the trial Magistrate erred in law and fact in finding the Appellant 100% liable for the accident. In awarding inordinately high general damages and in awarding future medical expenses while the same was not pleaded by the Respondent. We further submit that the trial Court applied the wrong principles in coming to its determination. The Respondent did not provide any evidence as to the Appellant's liability to a balance of probability of warrant such determination. We therefore pray that the trial Court's Judgment in Kabarnet PMCC No. 33 of 2014 delivered on 26th July, 2016 in be reviewed and/or set aside. We further, humbly urge your Lordship to uphold this appeal with costs."

6. For the respondent, by Submissions dated 16th September 2019, it was contended that the respondent had on a balance of probability proved negligence on the part of the 2nd appellant who, it was urged, was the 1st appellant's servant for purposes of vicarious liability, as follows:

I. WHETHER THE RESPONDENT PROVED HIS CASE ON A BALANCE OF PROBABILITY?

Your Lordship, the respondent in his evidence in chief stated that on 22nd December 2011, the 2nd appellant a neighbor and the son of the 1st appellant requested him to accompany him to Nakuru to buy animal feeds.

He agreed to the request and they went to Nakuru using the 1st appellant motor vehicle registration number KAW 164Y pickup driven by the 2nd appellant.

That the 2nd appellant was driving the motor vehicle at a high speed and on reaching Kabarnet farm opposite Kabarak University along Marigat-Nakuru road the 2nd appellant almost collided with a truck and drove off the road. As a result the 1st appellant lost control of the motor vehicle thereby causing an accident. The respondent sustained severe injuries and lost consciousness and woke up one month later at AIC Kijabe Hospital.

He attributed the cause of the accident to the reckless and careless driving of the 2nd appellant in that he drove the motor vehicle at a very high speed, failed to slowdown, swerve and/or control the motor vehicle.

It was his evidence that he did not contribute to the accident as he had put on the safety belt and did not distract the 2nd appellant. Further he did not enjoy the speed at which the motor vehicle was being driven at, but could do nothing as he did not have experience on driving.

On cross examination he stated that the motor vehicle was being driven at a speed which was over 100 km per hour and that he was seated in the front.

From the above brief evidence it is clear that the respondent was passenger in the 1st appellant motor vehicle registration number KAW 164Y Pickup driven by the 2nd appellant. Further the respondent has demonstrated that the motor vehicle was been driven recklessly and/or carelessly at a high speed over 100 km per hour and that the 2nd appellant was unable to control the motor vehicle as it almost collided with a truck forcing him to drive off the road thereby causing the accident.

The appellants did not controvert the evidence tendered by the respondent on liability and it is therefore our submission that the Honourable Magistrate correctly applied the law in finding the 2nd appellant 100% liable for the accident and cannot be faulted.

The contention by the appellants that the respondent stated that the 2nd appellant was evading hitting another vehicle at the time of the accident is unfounded. It is clear from the evidence of the respondent that the 2nd appellant was driving at over 100 km per hour hence he could not control the motor vehicle in terms of slowing down, swerving and/or avoiding causing the accident.

Further, it is evident that the 2nd appellant did not do anything to avoid causing the accident in terms of slowing down, swerving and /or controlling the motor vehicle so as to avoid causing the accident. He simply drove off the road.

We therefore urge your Lordship not to fault the finding of the Honourable Magistrate on this issue.

II. WHETHER THE AWARD ON GENERAL DAMAGES/QUANTUM WAS INORDINATELY HIGH

Your Lordship, the respondent in his pleadings stated that he sustained the following injuries:

a) Left hip and tibia fracture.

b) Right mid temporal tube area brain contrusion.

c) Head injury.

d) Soft tissue injuries.

It was clear from the evidence of the respondent that he sustained severe injuries which resulted in loss of consciousness for one month, memory loss, slurred speech with excessive stammering, left hip joint persistent pain and limited movement which will give rise to post-traumatic osteo-thritis of the of joint and has several ugly scars all over the body.

The medical reports of Dr. Joseph C Sokobe and Dr. M.S Malik which were produced by consent confirm the said injuries and the resultant disabilities and have assessed the degree of permanent disability at 40% and 20% respectively.

Arising from the said severe injuries and the permanent debilitating disabilities the respondent has suffered and will continue to suffer for the rest of life the award of Ksh.1,500,000/= general damages by the Honourable Magistrate was on the lower side. In fact it pales in comparison to the awards made in injuries of a similar nature which are in the region of Ksh.3,000,000/=.

We therefore urge your Lordship to exercise your discretion and enhance the award to reflect the magnitude of the injuries suffered by the respondent and the state of permanent disability.

The contention by the appellants that parties must be bound by their pleadings is unfounded in that the honourable Court did not take into consideration extraneous injuries in making the award. Further the injuries enumerated in the plaint are in tandem with the injuries set out in the medical reports.

In the circumstance we wish to adopt our submission to be found on pages ***(69-71) of the record of appeal)*** *wherein we had submitted for a sum of* ***Ksh.3,000,000/=*** *general damages based on the severe injuries suffered by the respondent and the permanent disabilities.*

Further we wish to reiterates authorities cited in our said submissions are reproduced herein.

1. MOMBASA HCC NO 79 OF 2012 GABRIEL MWASHUMA – VERSUS – MOHAMMED SAJJAD AND MILLY GLASS WORKS LTD.

The plaintiff was driving his motor vehicle when he was involved in a collision with another motor vehicle and suffered extensive injuries as follows:

a) Femur shaft spiral wedge fracture.

b) Pilon Tibia communuted fracture left anide joint.

c) Fibular shaft fracture.

d) Abrasive fracture on the left patella and femur condyle median.

e) Soft Tissue on the left knee.

f) Distinct haematoma especially on the left leg.

g) State of shock throng polytrauma and blood loss.

h) Psychogen stress.

As a result of the injuries the plaintiff suffered 30% disability and was awarded Ksh.3 Million as general damages.

In the aforesaid case ALEX WACHIRA NJUGUNA –VERSUS- GATHUTHI JEA FACTORY AND ANOTHER (2010) KLR was cited wherein the plaintiff suffered injuries to the head with contusion, fracture of the left tibia, right fibula, cut wound on the forehead, bruised elbow and knee. He was awarded Ksh.3,000,000/= general damages.

2. MERU HCC NO.100 OF 2016, H.K.N VS KENAFRIC BAKERY LTD AND ELPHAS MUGAMBI

The plaintiff a minor was involved in an accident and suffered serious injuries to the head with brain contusion and oedema, fracture of left mandible, degloving injury to the right thigh and other soft tissues injuries. As a result of the injuries he suffered 60%

disability and was awarded Kshs.2.5 Million general damages.

3. NAIROBI HCC NO.715 OF 2002 ERIS ONDUSO OMONDI –VERSUS- TECTURA INTERNATIONAL LTD & JOHN MUSYIMI

The plaintiff a minor at the time of the accident sustained fracture of the right tibia and blunt injury to the head which resulted in loss of consciousness, blunt injuries to the right hand and the upper front teeth. As a result of the accident the plaintiff complained of forgetfulness, had a slurred speech with poor memory and abnormal behavior in form of excess laughter on his own. She was awarded Ksh.3 Million general damages for pain and suffering.

It is apparent that the injuries suffered by the respondent were severe and ought to have been awarded an award comparable to the foregoing authorities hence the award of Ksh.1,500,000/= as general damages was not inordinate.

III. WHETHER FURTURE MEDICAL EXPENSES WERE PLEADED?

As regards the issue of future Medical expense, we concede that it is not tenable has it was not pleaded, however this has never being an issue since we have all along expressed our wish to abandon it during our mutual negotiations which lead to the partial payment of the decretal amount. Infact it had been mutually agreed that the ward on this subject head would be taken up by costs of the suit.

In light of the foregoing and in summary, we urge your Lordship to dismiss the appellants' appeal on the grounds:

I. That the Honourable Magistrate correctly applied the Law in finding the 2nd appellant 100% liable for the accident.

II. The further the honourable Magistrate correctly applied the Law in awarding the respondent general damages of Ksh.1,500,000/=.

III. That the Honourable Magistrate correctly found that the respondent had proved his case on a balance of probability.

The appeal is therefore without merit and urge the Honourable Court to dismiss it with costs to the respondent. We so submit."

Issues for determination

7. Three issues that arise from the appeal as follows:

a) Whether the respondent has proved his claim in negligence against the appellants

b) Whether the respondent is entitled to damages; and

c) Whether special damages for future medical expenses are recoverable in this case.

Determination

8. As a first appellate Court, this Court has a duty as held in the oft-cited ***Peters v. Sunday Post Ltd.*** (1958) EA 424 to review the evidence presented before the trial Court as - in the words of the Court of Appeal -

"Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is to be exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate so to decide. Watt v. Thomas (1947) 1 ALL ER 582, (1947) AC 484, applied."

Counsel for the appellants in this case has cited several authorities set out in their submissions to this same effect.

Whether negligence proved against the appellants

9. The learned authors of ***PHIPSON ON EVIDENCE,*** 16th ed. (2005) at pp. 154-5, line paragraph 6 – 53 observe as regards the **standard of proof in civil cases** as follows

"The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not."

10. In similar wording section 3 (2) of the Evidence Act -

"A fact is proved when, ***after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.****"*

11. I respectfully agree with the learned dictum of my great evidence law teacher Ringera, J. (as he then was) in ***Grace Kanini Muthini v. Kenya Bus Service and Another*** HCCC 4708 of 1989 on a situation where there exists equal probabilities quoted extensively in ***M'Mbula Charles Mwalimu v. Coat Broadway Company Limited*** (2012) eKLR as follows:

> ***"On liability, the Plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document indicated that on 15th August, 1988 at 2.20p.m. an accident occurred on 1st Avenue, Eastleigh and General Waruinge junction involving motor vehicle KVZ 919 owned by the first defendant and driven by the second defendant and one Muthini Ndunda, the deceased. The said Muthini Ndunda is described therein as a pedestrian and the injuries are said to have been fatal. This document does not improve the case of the plaintiff. All that is recorded therein is the fact of an accident involving the deceased and the 1st defendant's motor vehicle which was being driven by the 2nd defendant.....***
>
> ***What is disputed is whether he sustained the fatal injuries as a result of his own negligence or as a result of the negligence of the driver, or partly as a result of his negligence and partly as a result of the driver\'s negligence. The Plaintiff's evidence does not shed any light on this disputed fact. And the defendant preferred not to offer any evidence. If the defendant had the burden of proof, I would have unhesitatingly presumed some adverse fact against him. But he did not bear the burden of proof. It was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was caused by the negligence of the second defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probably if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the Plaintiff's suit on the ground that fault has not been established against the defendants....."***

12. The question arising, therefore, is whether, on the evidence before the trial Court, this appellate Court believes it more probable than not that the accident pleaded in the plaint, occurred, that the accident was caused by the 2nd appellant's negligence and the nature and extent of injury pleaded. Thereafter, if liability is established, the Court may go into the question of damages.

Findings of fact

13. There is no evidence in rebuttal and the Court on the balance of probability test will consider the evidence adduced by the respondent plaintiff was sufficient to prove the alleged facts as ***more probable than not***. The appellants did not lead evidence as to how else the accident did or could have happened and the Court is left with the testimony of the respondent as tested, of course, by cross-examination by counsel for the appellants.

14. The full text of the evidence by the respondent plaintiff was as follows:

> "***10/5/16***
>
> ***PW1 male adult is sworn.***
>
> *My name is Laban Kiptoo.*
>
> *I am resident of Kasoyo within Kabarnet.*
>
> *I am student at Mt Kenya University.*
>
> *I am the plaintiff herein.*
>
> *On 22/12/2011 my neighbor asked me to go with him to Nakuru to pick animal feeds.*
>
> *The neighbor was named as Peter Kemboi the 2nd defendant herein.*
>
> *I agreed to go with him using motor vehicle Registration No. KAW 164Y.*
>
> ***When we reached Kabarnet we were involved in an accident as the driver was at a high speed.***
>
> ***The driver had almost collided with tract and he decided to drive off the road as he was on high speed.***
>
> ***I did not remember what happened after the motor vehicle left the road.***
>
> *I had lost conscious for about a month.*
>
> *I woke up at Kisase Mission Hospital after one month.*

I was discharged on 14/2/12. I have the discharged summary in Court.

The discharge summary is produced as exhibit P3.

I have another discharge form dated 14/2/12.

The same is produced as exhibit P4.

I was informed that I was taken to Valley Hospital at Nakuru after the accident but I did not see.

After discharge I went to the police station at Menegai and I was issued with the police abstract.

My name is on the police abstract.

The police abstract is produced as exhibit P5.

I was issued with P3 form dated 22/12/12 and filled in 26/11/13.

I wish to produce the P3 as exhibit P6.

I had suffered soft tissue injured to the body internally.

I also suffered fracture of the hip and dislocation on the left side and I have metal and plates in plant even now.

The doctor estimates that it will cost me Ksh.3000000/= to remove the plate.

I also suffered speech as I am now a stammer.

I paid Ksh6000/= for the medical report.

Report is produced as exhibit P7.

At Valley hospital we paid Kshs71,030/=. I have the report before Court.

The reports are produced as exhibit P8.

At Kijabe Mission Hospital I spent Ksh691,000/=.

I have the receipts to that extent.

The receipts are marked as MFP9.

After discharge I spent Ksh16775 for medical checkup.

I have a receipt for that.

The same are produced as exhibit P10.

I have prepared total summary of all the expenditure at Ksh778,805/=.

The summary is produced as exhibit P11.

The accident was caused by the careless driving as the driver was over speeding.

I know the 1st defendant. He was the driver of the suit motor vehicle.

I had suffered injuries due to the accident.

I did not contribute to the accident as I had put on the safety belt.

I did not distract the driver of the said motor vehicle.

I did not enjoy the speed but I could do nothing as I did not have any experience on driving.

Peter Kemboi was the son to the first defendant.

I urge the Court to help me recover general damages and special damages and future medication with costs.

I stopped going for checkup.

S O TEMU, PM

CROSS-EXAMINATION by Nasimuyu

Peter Kemboi was my neighbor.

He is not my cousin.

Our parents have no relationship.

That was the 1st time I escorted him to Nakuru for feeds.

I had not dealt with him before.

The motor vehicle was being driven at a speed which was over 100km.

I was seated on the front seat of the motor vehicle.

My father paid for general damages.

I don't know whether an harambee was conducted for medical bills.

I am now limping. My life is back and I am 4th year student.

I stay at home and I commute to school.

I can read write and do exams but is easily forget.

When the accident took place I had first cleared my exams in form four.

After that I had joined university.

S O TEMU, PM

RE-EXAMINATION

The speed was between 103 – 107 per hour.

I use matatu to college because I can't walk for distance.

S O TEMU, PM

That is the close of the plaintiff's case."

15. From the evidence of the respondent plaintiff, it was established that the 2nd appellant was driving fast and was, consequently, unable to control his vehicle as he sought to avoid hitting a tractor, the respondent testifying that –

"***When we reached Kabarnet we were involved in an accident as the driver was at a high speed.***

The driver had almost collided with tract and he decided to drive off the road as he was on high speed.

I did not remember what happened after the motor vehicle left the road."

16. There is, contrary to the situation in Ringera's ***Grace Kanini,*** no multiple probabilities in this case. The appellants did not testify and put up a different probability as to how the accident happened other than the respondent's case that the 2nd appellant was speeding and to avoid hitting a truck he had driven off road. The respondent who was seated at the front of the vehicle could well observe that the vehicle was driven at a high speed which he gave as over 100Km/hour, in re-examination saying "*The speed was between 103 – 107 per hour.*" The suggestion in cross-examination that the respondent may have contributed to the accident by egging the 2nd appellant to dive fast as he was

enjoying the high speed was not supported by any evidence.

17. With respect, the 2nd appellant's negligence is not in the veering of the road to avoid a collision, which is commendable; it is in the driving in a manner making such action necessary. The fact of going off the road, while a way to avoid a collision with the tractor, *which was not shown to have been on the wrong in any way*, is also a manifestation of the high speed that made the control of the vehicle by breaking slowing down impossible!

18. Negligence was in the driving at a high speed without due care that there were other vehicles and other road users to avoid collision with whom he would be required to slow down, and consequently should drive at such speed bearing in mind the traffic on the road and nature of the road and all surrounding circumstances that would permit the driver to safely control his vehicle and avoid accidents. The suggestion that another person could have been the cause of the accident and or contributed thereto must be proved by the maker in accordance with section 109 of the Evidence Act that –

> "*The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

19. There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believe the explanation for the accident as given by the respondent, and there was in it no reasonable hypothesis that another vehicle or person was involved in the cause of the accident. The respondent had discharged his burden of proof under sections 107 and 108 of the Evidence Act in showing that the accident was occasioned by the 2nd appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person the Court finds on a balance of probabilities that the events as related by the respondent are more probable than not.

20. The Court must hold the 2nd appellant liable for the accident at 100%.

General Damages for pain and suffering and loss of amenities

21. In ***West (H) & Son Ltd. vs. Shepherd*** (1964) A.C. 326, it was established as regards assessing fair and reasonable compensation for personal injury cases that ***"awards must be reasonable and must be assessed with moderation [and] furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards…."***

22. Citing *Gerald Ireri Harrisson & 2 Ors. v. Danson Ngari* (2018) eKLR awarding ksh.800,000/- for a compound depressed fracture of the skull and mild traumatic injury and *David Kimathi Kaburu v. Dionisius Mburugu Itirai* (2017) eKLR which awarded 630,000/- for a dislocation of the right hip joint and fracture of the right femur, the appellants urged a reduction of the general damages herein to Ksh.800,000/- pointing out that the injuries pleaded in the Plaint were similar being:

> "***PARTICULARS OF THE PLAINTIFF'S INJURIES***
>
> *a. Left hip fracture.*
>
> *b. Right mid temporal tube area brain contusion.*
>
> *c. Head injury.*
>
> *d. Soft tissue injuries.*"

23. The respondent's evidence of the injuries was that -

> "*I had suffered* ***soft tissue injuries*** *to the body internally.*
>
> *I also suffered* ***fracture of the hip*** *and* ***dislocation on the left side and I have metal and plates in plant even now.***
>
> *The doctor estimates that it will cost me Ksh3000000/= to remove the plate.*
>
> ***I also suffered speech as I am now a stammer.***" (sic)

24. With respect, the two doctor's reports produced by the Plaintiff are consistent with the nature of injuries set out in the Plaint and are agreed that there was a measure of permanent injury respectively at 40% and 20% as follows:

> Dr. J.C. Sokobe's "*Opinion and prognosis* –
>
> *Laban Kiptoo sustained very severe soft tissue and bony injuries which have healed with the following complications:*
>
> *1. Loss memory and slurred (stammering) speech which will affect his academic performance.*

2. Ugly scars in the body.

3. Early osteoarthritis of the left hip joint.

Due to the above complication, I assess his permanent disability at 40% (forty percent). He will also need to undergo further surgical treatment to remove the implants at a cost of Ksh.300,000/-."

Dr.M. S. Malik's *"Conclusion:*

He suffered TOTAL incapacity of a TEMPORARY nature for a period of ONE YEAR followed by a partial incapacity of a PERMANENT nature TO DATE. I would be inclined to award him permanent physical disability benefits amounting to about TWENTY PERCENT."

These injuries are clearly more severe than in the two cases cited by the appellants. For purposes of assessment in this case I adopt the lower of the two doctor's disability assessments at 10% permanent disability, being mindful of the counsel of Kneller JA. in ***Sheikh Mushtaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Ors.*** *(1986) eKLR,* supra, not to make awards so high that *"will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of the country."*

25. However, in the case authorities cited by the respondent the injuries have more severe and extensive injuries - extensive injuries assessed at 30% permanent disability in Mombasa HCCC 79 of 2012 *Gabriel Mwashuma v. Mohamed Sajjad and Milly Glass Works Ltd.* with multiple operations; more extensive injuries in *Alex Wachira Njuguna v. Gathuthi Tea Factory & Anor*. (2010) eKLR aggravated by two fractures of the left tibia and right fibula where ksh.2,000,000/- was awarded; 60% disability in *HKN v. Kenafric Bakery Ltd. & Eliphas Mugambi*; where Ksh.2.5 Million was awarded and more extensive injury and brain function damage in the minor's case of *Eris Ondusa Omondi v. Tectura International Ltd. & John Musyimi* Nairobi HCCC NO. 715 of 2002, where Ksh.3,000,000/= was awarded.

26. The respondent's injuries compare ***only*** slightly with the injuries in minor ***Peris Onduso Omondi's*** case, where the plaintiff suffered fracture of the right tibia and blunt injury to the head resulting in loss of consciousness, poor memory, forgetfulness slurred speech for which he was award Ksh.3,000,000/-. The injuries on the plaintiff in the case were however more serious resulting in *"forgetfulness and was absent minded, had astagerring walk as well as inability to write while exhibiting an abnormal behavior in form of excessive laughter on her own [and] slurred speech with poor memory and very poor coordination of the right hand hence unable to write…"*

27. The respondent in this case has recovered, according to his own testimony and doctors reports. He testified on cross-examination that

"*I am now limping.* ***My life is back and I am 4th year student.***

I stay at home and I commute to school.

I can read write and do exams but is easily forget.

When the accident took place I had just cleared my exams in form four.

After that I had joined university."

28. It would appear that the nature of injuries in this case are more physical than mental, thank God, and the respondent is well able to continue his studies to highest level of academic achievement and the case on ***Peris Onduso*** where there was extensive mental faculties is not a suitable guide. Dr. Malik whose lower 20% disability report the Court has accepted concluded in the report that-

"***OPINION***

Laban sustained a head injury of the left hip joint and fractures of the pelvis as a result of a road traffic accident. He was admitted to hospital and he developed internal bleeding from duodenal. The ulcer was probably a pre-existing problem but the stress of the accident and the injuries may have caused the bleeding. He underwent a major abdominal problem and developed life threatening complications in his lungs. He was admitted to ICU and put on life support machines. He had a tracheostomy tube inserted into his neck and he breathed through this tube for some time. He made good recovery and was later taken for open reduction and internal fixation of the fractured acetabulum. His joint was reduced and his fractured pelvis was treated conservatively. He still complains of pain in the hip joint when walking. The dislocation of the hip and open reduction and internal fixation of the fractured pelvis will give rise to post-traumatic osteoarthritis of the hip joint."

29. In addition, the fact that the respondent was hospitalized for one month and had according to Dr. Malik *"total incapacity of a temporary nature for a period of one year"* must be considered in assessing the award for pain and suffering. To be sure even the Court in *David Kimathi Kaburu* (Gikonyo, J.) accepted that *"the post-traumatic consequences on the respondent are severe and will have a bearing on the amount of damages."*

30. On the principle of comparable awards for comparable injuries, I would consider the award of Ksh.1,500,000/- for pain and suffering and loss of amenities to be sufficient recompense for the injuries in this case accepted at the lower doctor's assessment of 20% permanent disability, and consequently rejects the respondent's claim for an award of Ksh.3,000,00/- but upholds the trial Court's award of general damages at Ksh.1,500,000/-

Vicarious liability

31. Although the ownership of the motor vehicle is shown by the Police Abstract instead of a search certificate from the Registrar of Motor of motor vehicles, evidence that the 1st appellant father of the 2nd appellant had sent the 2nd appellant to collect animal feeds for his purposes would establish the vicarious liability of an principal for the acts of an agent or servant, which need not depend on the proof of ownership of the motor vehicle. However, as shown in the full text of the submissions of the appellants no issue was raised as to applicability of vicarious liability.

Special damages

32. As regards the claim in special damages, it is long established that special damages as distinct from general damages must be specifically pleaded and proved. The learned authors of ***Mcgregor on Damages***, 17th ed. 2003 at pp. 21-2 have in distinguishing general and special damage noted as follows:

> *"The third meaning of general and special damage concerns pleading. The distinction here is put thus by Lord Dunedin in The Susquehanna [1926] A.C. 655, 661.*
>
> *"If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question."*
>
> *And in Stroms Bruks Aktie Bolag v. Hutchison [1905] A.C. 515, Lord Macnaghten, after stating that he thought the division into general and special damages was more appropriate to tort than contract, said:*
>
> *"'General damages'… are such as the law will presume to be the direct natural or probable consequence of the action complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."*
>
> *Here, in pleading, general damage is wider than its second meaning, for it includes losses the amount of which the law will not presume since this is capable of calculation, and therefore evidence to assist the Court in doing the calculation must be given if the claimant wishes to obtain substantial damages on the general head. Thus in a personal injury case, loss of future earning capacity and future expenses are general damage in pleading but the claimant must clearly give evidence of amount. On the other hand general damage in pleading tends to be narrower than its first meaning.* ***Thus in a personal injury case again, the loss of earnings and the expenses incurred between injury and trial must be pleaded as special damage; yet they are ordinary foreseeable consequences. The present distinction is set out in regard to personal injury cases by Lord Goddard in British Transport Commission v Gourley [1956] A.C 185, 206 where he said:***
>
> ***"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or the permanent disability, compensation for loss of earning power in the future."***

33. The point that future medical expenses were not pleaded is conceded by Counsel for the respondent and the special damages for future medical expenses which have been abandoned by the respondent, and are really general damages if there are prospective rather than expenses already incurred loss, and would, therefore, be rejected as having already been catered for in the award of general damages. ***McGregor*** ibid. at p. 1257 paragraph 35-157 clarifies this point as follows:

> *"**MEDICAL EXPENSES***
>
> *(1) In general*
>
> *The claimant is entitled to damages for the medical expenses reasonably incurred by him as a result of the injury: no authority is needed to support this statement, for cases are legion which include such outlays in the damages awarded. Expenses of medical treatment, of attendance of doctors and nurses, of medicines and appliances, of hospital fees, of transportation to hospital, of nursing attendance between the place of injury and the claimant's home: these are all recoverable. The only condition is that they should be reasonable, a condition implied in the reference to reasonableness in s.2(4) of the Law Reform (Personal Injuries) Act 1948.* ***Both expenses already incurred at the time of the trial and prospective expenses are recoverable, and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division, which depends purely on the accident of the time that the case comes on for hearing, implies no substantive differences. Interest, however, is awarded on the special but not on the general damages."***
>
> The Court will, therefore, set aside the trial Court's award on future medical expenses at **Ksh.300,000/-**.
>
> 34. Special damages of ***an unstated sum*** were pleaded at paragraph 6 of the Plaint as follows:

"*5.* ***As a result of the accident the plaintiff sustained serious injuries and has suffered loss and damage.***

PARTICULARS OF THE PLAINTIFF'S INJURIES

e) Left hip fracture.

f) Right mid temporal tube area brain contrusion.

g) Head injury.

h) Soft tissue injuries.

PARTICULARS OF SPECIAL DAMAGES

iii) Medical report……..Ksh.3500/=

iv) Medical expenses to be stated……

And the plaintiff claims general and special damages."

Obiter

35. Although the full extent of the special damage claim is not stated in the Plaint, sometimes a ruse used by pleaders to avoid Court filing ***ad valorem*** fees at the initial stage, the amount is shown to have been proved by documentary evidence by way of receipts of payment to various hospitals and medical related expenditure.

36. As observed in ***Bullen & Leake & Jacob's Precedents of Pleadings*** 15th ed. (2004) Vol. 1 p.10, "Lord Hoffman [in ***Barclays Bank v. Boulter*** [1999] 1 WLR 1919 at 1923, [199] 4 ALL ER 513, 517] summarized the basic function of pleading as being: *'the purpose of pleadings is to define the issues and give the other party fair notice of the case which he has to meet."*

37. If it is accepted that the object of pleading is to inform the opposite party of the case that he has to meet from the other party, I would say that it is sufficient that the plaintiff disclosed to the defendant in this case that he would be asserting and seeking compensation for special damages, the exact figure of which he did not have at the time of pleading. The Plaintiff produced as exhibits the receipts for the expenditure and the defendant was consistent with the right to fair hearing able to cross-examine the plaintiff thereon. I think it would be unjust to reject the claim for special damage proved by receipts before the Court merely because the total figure of the amount of the claim was not set out in the Plaint. The overriding objective of the civil process as set out in section 1A of the Civil Procedure Act is to:

"***1A (1)*** *The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act*".

Conclusion

38. The Court finds on a balance of probabilities that the respondent plaintiff has proved his claim in negligence against the 2nd appellant, and vicariously against the 1st appellant at 100% liability. The award of general damages at ***Ksh.1,500,000/-*** is not inordinately high for the injuries suffered by the respondent to justify the interference by this Court on the award by the trial Court on the principle by Law, JA. set out in ***Butt v. Khan*** (1981) KLR 349*;* See to the same effect *Shabani v. City Council of Nairobi* (1985) KLR 516; *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727.

39. I respectfully agree with the principle of award of damages that comparable injuries should be compensated by comparable awards. See Sheikh Mustaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Ors. (1986) eKLR. I consider that the sum of Ksh.1,500,000/- meets the justice of the case. The award on the unpleaded cost of future medical expenses of Ksh.300,000/- is set aside for offending the rule on specific pleading of special damage. The special damages award of ***Ksh.782,255/=***, for special damage pleaded in Plaint but without a total sum thereof being given but which was proved by exhibits of receipts produced before the trial Court is allowed.

Orders

40. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The appeal is allowed to the extent that the damages for future medical expenses at the sum of **Ksh.300,000/-** is set aside.

2. The awards of General Damages for pain and suffering and loss of amenities at **Ksh.1,500,000/-** and Special damages at ***Ksh.782,255/=*** are upheld.

3. As the appeal is only partly successful, there shall be no order as to costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mukite Musangi & Co. Advocates for the Appellants.

M/S M.K. Chebii & Co. Advocates for the Respondent.