REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 198 OF 2013

GEORGE MUGO ..... 1ST APPELLANT

JOHN NDUNGU ..... 2ND APPELLANT

VERSUS

A K M (Minor suing through next friend and mother of

A M K ..... RESPONDENT

JUDGEMENT

(*Being an appeal from the judgement delivered by the Honourable Mwangi K. Mwangi, Senior Principal Magistrate at Machakos on the 5th September, 2013 in **CMCC NO. 1527 OF 2009***)

1. The appeal arises from the judgement of Hon Mwangi K. Mwangi delivered on the 5th September, 2013 in **Machakos CMCC No. 1527 of 2009** where a sum of Kshs.300,000/= was awarded to the Respondent as general damages for pain and suffering as well as sum of Kshs.3,700/= being special damages in addition to costs of the suit plus interest.

2. The Appellants was aggrieved by the said judgment and lodged the following seven (7) grounds of appeal.

(i) The learned magistrate misdirected himself on the assessment of quantum of general damages.

(ii) The learned magistrate erred in law and in fact in awarding damages for injuries not pleaded in the plaint totally disregarding the law that parties are bound by their pleadings.

(iii) The learned magistrate erred in law and in fact in his award of general damages of Kshs.300,000/= without any evidence and/or explanation how it was arrived at in his judgment and which amount or figure was not at all relied upon in evidence and/or proved at trial

(iv) The learned magistrate erred in law and in fact in finding that the plaintiff suffered the injuries as pleaded and not considering the Defendant's evidence disputing the said to soft tissue injuries only.

(v) The learned trial magistrate erred in law and in fact in awarding Kshs.300,000/= as general damages which amount was contrary to conventional awards in similar and/or related cases by superior courts of law.

(vi) The learned magistrate erred in fact and in law in failing to totally consider the Defendant's submissions.

(vii) The learned magistrate erred in fact and in law in making an award for special damages that had not been strictly proved at trial.

3. The Appellant therefore sought for the following reliefs:-

(a) The appeal be allowed with costs.

(b) The judgement of the Honourable Senior Principal Magistrate be discharged and/or set aside with costs to the Appellants.

(c) The Honourable Court be pleased to award the correct amount on quantum and/or general damages in light and analysis of the

evidence adduced in court at trial.

4. This being the first appellate court, its duty is to re-evaluate and analyze the evidence adduced before the trial court and come to its independent conclusion bearing in mind that it neither saw nor heard the witnesses testify but to make an allowance for the same (see **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123.**

5. PW.1 A K M testified that he was aboard the Appellants motor vehicle registration number KAT 173 A when it was involved in an accident and that he sustained injuries on the chest, shoulder and wrist. He was treated at Machakos General Hospital and was later examined by Dr. Kimuyu who prepared a medical report. He produced the treatment notes, copy of motor vehicle records and receipts. He confirmed in cross- examination that he was taken for an X-ray on the chest.

6. PW.2 Dr. Judy Kimuyu testified and stated that she examined the Respondent and noted blunt injuries on the left shoulder, chest and a fracture of left humerus. She formed the opinion that the Respondent suffered bone and soft tissue injuries. She produced her medical report. On cross- examination she stated that there was a closed fracture of the left humerus.

7. Dw.1 Dr. Sophia Wakio testified for the Appellant and stated the Respondent only sustained soft tissue injuries which had healed by the time of examination and that the alleged fracture of the left humerus had been established by the Appellant's appointed consultant radiologist to have been erroneous. On cross–examination, she stated that a closed fracture only occurs where there is no open wound and vice versa. She produced the Respondent's second medical report.

8. It is noted that prior to the case proceeding for hearing, the parties entered into a consent on liability in the ratio of *10% to 90%* in favour of the Respondent and hence the evidence that was presented was only on the assessment of quantum of damages.

Submissions:

9. Learned counsel for the Appellant submitted that the trial court went into error when it considered injuries allegedly sustained by the Respondent yet the same had not been pleaded. The Appellant's Counsel further submitted that it is trite law that parties are bound by their pleadings and therefore since the trial court had considered unpleaded matters then this court should interfere with the decision. The case of **IEBC & ANOTHER =VS= STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** was relied upon. On quantum the sum of Kshs.70,000/= was proposed and reliance was placed on the case of **EASTERN PRODUCE (K) LTD (SAVANI ESTATE) =VS= GILBERT MUHUNZI MAKOTSI [2013] eKLR** where a sum Kshs. 70,000/= was awarded for soft tissue injuries.

10. This court did not receive submissions from the counsel for the Respondent as none was found at the time of writing this judgement. However I would suppose that even if there are no submissions from the Respondents counsel, they are deemed to support the decision of the trial court which awarded the Respondent general damages of Kshs.300,000/=.

Determination:

11. I have considered the evidence adduced before the trial court as well as the submissions presented herein. I find the following issues necessary for determination namely:-

(i) Whether the trial magistrate erred in law and in fact by considering injuries sustained by the Respondent that had not been pleaded.

(ii) What is the quantum of damages that ought to have been awarded by the trial court?

12. As regards the first issue, it is noted from the Respondent's plaint dated 6/11/2009 that the injuries pleaded vide paragraph 6 thereof were as follows:-

(a) Blunt injury left shoulder.

(b) Blunt chest injury interior.

(c) Bruises of left wrist region.

(d) Blunt injury left arm.

During the hearing of the Respondent's case, the issue of a fracture of left humerus was brought up by the Respondent's witness Dr. Judy Kimuyu who had examined him and prepared a medical report. The said medical report together with the treatment card and P.3 form seem to reveal the issue of the fracture of left humerus. However, the Appellants called Dr. Sophia Wakio who produced a second medical report conducted on the Respondent which indicated that he had sustained only soft tissue injuries. The Appellant's witness had stated that the X-ray reports had been checked by their consultant radiologist who disputed the alleged fracture and indicated that there was no fracture found on the X-ray films. The learned counsel for the Respondent before the trial court had submitted that the Appellant should have called the said radiologist to testify. However what is glaring herein is that the Respondent did not bother to amend his plaint so as to introduce or plead the new injuries of fracture of left humerus as claimed by his doctor. It is a trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments of the pleadings should not be considered. The rationale for this is to prevent parties from being ambushed since the rules of procedure requires that all the parties are on an equal footing when they appear before the court to litigate their cases. Hence the fracture of the left humerus that had not been pleaded ought not to have been considered by the trial court. The Respondent did not seek to amend the plaint formally or orally prior to the hearing so as to entitle him and his witnesses

to give evidence regarding the particular injury. It is therefore quite clear that the Respondent sustained soft tissue injuries and which appear to be in tandem with the medical report by the Appellant's doctors. Suffice to add that the Appellant's consultant radiologist had disputed the alleged fracture of the left humerus. The learned trial magistrate therefore had considered an irrelevant matter which ought not to have been taken into account and thus arrived at an erroneous estimate of the award of damages and which has precipitated this appeal.

13. As regards the second issue, it is trite that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It should be shown that in arriving at the award, the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect. As noted above, the learned trial magistrate had factored the aspect of the fracture of left humerus when assessing the quantum of damages to be awarded whereas he ought to have restricted himself to the injuries pleaded which were mostly soft tissue in nature. I am therefore inclined to interfere with the award of damages. In the case of **EASTERN PRODUCE (K) LTD (SAVANI ESTATE) =VS= MUHUNZI MAKOTSI [2013] eKLR** the Respondent therein who had sustained soft tissue injuries when he slipped into a hole within a tea plantation was awarded Kshs.70,000/= as general damages. Also in case of **ROBERT NGARI GATERI =VS= MAINGO TRANSPORTERS [2015] eKLR** a sum Kshs. 60,000/= was awarded for soft tissue injuries. The medical report presented to the trial court by the Appellant herein dated 21/05/2010 indicated that the Respondent's injuries were soft tissue in nature and he had healed well. The award of Kshs.300,000/= as general damages by the trial magistrate was thus inordinately high and did not reflect a reasonable estimate of damages and thus it's should be interfered with so that the damages would accord with the soft tissue injuries suffered by Respondent. Going by the above two authorities which are fairly recent, I find an award of Kshs.90,000/= would be adequate as general damages for pain and suffering. As regards special damages I note that the Respondent had pleaded the sum of Kshs.4,200/= but only produced receipts worth Kshs.1,200/= in respect of treatment, police abstract and motor vehicle search and therefore special damages ought to have been Kshs.1,200/= instead of Kshs.3,700/= as awarded by the trial court.

14. In the result I allow the appeal, set aside the judgement of the trial court by substituting the sum of Kshs.300,000/= with an award of Kshs.90,000/= as general damages. The special damages of Kshs.3,700/= is also substituted with the sum of Kshs. 1,200/=. The sums shall of course attract 10% contributory negligence. As the Appeal has partly succeeded. I order that each party to bear their own costs of the appeal but the Appellant shall meet Respondent's costs in the lower court.

Orders accordingly.

Dated and delivered at MACHAKOS this 11th day of June, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Kariuki for the Appellants

Nagwere for Musyoka Kimeu - for the Respondent

Josephine - Court Assistant