REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 51 OF 2016

SAID MOHAMMED

T/A BULBUL TRADERS.....1ST APPELLANT

PURITY W. KAMAU.....2ND APPELLANT

VERSUS

EMILY WAVINYA MUTUA.....RESPONDENT

[Being an appeal from the judgment of Honorable M.K Mwangi, Principal Magistrate, in Machakos CMCC No. 1339 of 2010 delivered on 30th October 2015]

JUDGEMENT

1. By a judgment delivered on 30th October, 2015 by Hon M.K. Mwangi (PM) in Machakos CMCC NO 1339 OF 2010, the Learned Trial Magistrate awarded the Appellant Kshs 600,000 being General Damages for pain and suffering and Kshs 254,444 as special damages as a result of a road accident that occurred on 19th September 2008, in which the Respondent was seriously injured.

2. The Appellant was aggrieved by the said award and filed this appeal on 9th June 2016. The grounds thereof are set out in the Memorandum of Appeal as follows:

> ***1. The Learned Trial Magistrate erred in law and fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries sustained by the respondent herein.***
>
> ***2. The Learned Trial Magistrate erred in law and fact in making such a high award on general damages and awarding special damages that were not specifically pleaded and proved as to show that the magistrate acted on a wrong principle of law .***
>
> ***3. The Learned Trial Magistrates award on damages was so high as to be entirely erroneous.***
>
> ***4. The Learned Trial Magistrates award was made without considering the medical evidence, authorities and the respondent's submissions before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards hence ended up making and excessive award .***
>
> ***5. The assessment of special damages was not supported by required evidence so as to amount to a miscarriage of justice.***
>
> ***6. The whole judgment on quantum and special damages was against the weight of evidence before the court.***

3. When the matter came up for hearing on 31st July, 2018, I directed the Appeal be disposed by way of written submissions. The submissions are discussed below.

Arguments by the Appellant

4. In brief, Appellant's quarrel is with quantum of damages. He submitted that a medical report from Dr. Makali which was produced by the respondent assessed permanent incapacity at 25% whereas other doctors had indicated that the injuries had fully healed with no permanent

incapacitation. He further submitted that the medical documents, to wit; treatment notes from Machakos District Hospital, Makindu Hospital, Karen Hospital, Eldoret Hospital and Moi Teaching and Referral Hospital and the P3 were mentioned nowhere in the consent to warrant reliance on them by the trial court. The Appellant complained in his submissions that there was no oral evidence by the plaintiff nor any document relied on by the court hence the court misdirected itself by indicating the injuries sustained by the respondent. It was further submitted that the court failed to consider authorities relied on by the parties, despite them being persuasive in nature and therefore there is no indication in the whole proceedings as to how the award of Kshs 600,000/- as general damages was arrived at. *A fortiori*, that the court failed to take into account a relevant factor *qua* the plaintiff's injuries, inflation rate and age of comparable awards thus came to an erroneous award of damages. Consequently, the Appellant contended that a sum of Kshs 600.000/- was inordinately high, unfair, unreasonable and not commensurate with the nature of injuries as no permanent incapacitation had been indicated in any other medical reports.

5. On special damages, the Appellant submitted that the court took into account an irrelevant factor when coming up with the figure of 254,444/- that was neither consented to, nor receipts filed in support of the same. Therefore, awarding the said amount ought not to have been done.

6. It was contended that the appeal be allowed with costs.

Arguments by the Respondent

7. On the other hand, it was submitted for the Respondent who filed grounds of opposition that inter *alia*, the appeal is bad in law as the Appellant has proceeded to introduce a new party who does not and is not in any way in the records of the suit filed on CMCC No 1330 of 2010.

8. It was submitted that the respondent has suffered injuries that have caused her inability to use her right side and her teaching career has come to a halt, thus she is entitled to general damages as such amount awarded by the trial court for the same would be used by the respondent to continue seeking treatment from time to time. She relied on the case of **Easy Coach Limited v Emily Nyangasi Civil Appeal No.20 of 2015** in arguing that the magistrate in coming up with quantum for damages simply restated what was contained in the medical report and discharge summary hence there was no need to interfere with the discretion exercised.

9. I wish to point out on the aspect on future medical expenses that was also submitted upon; that it is a special damage claim which must be specifically pleaded and proved- something the Respondent had not done.

10. The respondent submitted that the quantum awarded by court ought not to be interfered with because the appellant has not raised sufficient grounds to justify interference and that the appeal should be dismissed with costs.

DETERMINATION

11. I have carefully considered this Appeal, the Grounds of opposition filed by the Respondent, submissions by the parties and the authorities relied upon by the parties. This being a first appeal, the court shall carry out its task, to wit, analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. On this see the case of **LAKE FLOWERS vs. CILA FRANCKLYN ONYANGO NGONGA & ANOR [2008] e KLR** where it was stated:

> ***"…being a first appeal, the principle upon which this court acts are well settled, in that the court must reconsider the evidence, evaluate it itself 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 that respect. In particular this court is not bound necessarily to follow the trial judge's findings of facts if it appears either that she 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.*** *Selle v. Associated Motor Boat Company [1968] EA 123****."***

The Grounds of Opposition

12. I wish to make preliminary observation in relation to the grounds of opposition filed by the Respondent before I deal with the issues raised. I note that the Respondent chose to oppose the appeal vide grounds of opposition. However the Respondent averred to factual matters in the said pleading. These matters would have been well addressed in a Replying Affidavit and/or submissions. The law is clear that a preliminary objection and/or grounds of opposition relates purely to matters of law.

In the Court of Appeal decision of; ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A. 696***, **Law, JA (as he then was)** stated as follows:

> ***"I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a 'preliminary objection' which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."(Emphasis mine)***

13. Further, the respondent did not even attempt to show in her submissions, arguments to advance the grounds of opposition. The upshot is that the grounds of opposition fail.

Legal test

14. This Appeal is on the issue of quantum only as liability was apportioned by consent at 80; 20 in favour of the Respondent. I recognize that assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

> ***''…the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 , he amount is so inordinately high that it must be wholly erroneous estimate of the damages''.***

See also the case of **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1 where it was stated that:-**

> ***"a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle" - see <u>EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278</u>***.

I will apply the foregoing test on the facts of the case.

15. The trial magistrate stated that he had considered the injuries sustained by the Appellant. He stated that, according to the treatment notes from Machakos District Hospital, Makindu Hospital, Karen Hospital, Eldoret Hospital and Moi Teaching and Referral Hospital and the P3 and the medical report by Doctor Makundi, the Respondent sustained tenderness of the back and right hip, swollen and tender right knee, right ankle and right elbow; The doctor assessed the degree of disability at 25%. The Report together with the medical reports were attached to the submissions to form evidence before the trial court. For these injuries, the Learned Trial Magistrate awarded the Appellant a sum of Kshs 600,000 as General Damages for pain and suffering. The question which this court has to ask itself is whether the Learned Trial Magistrate in awarding damages of Kshs 600,000 took into account an irrelevant factor or left out a relevant factor, or acted on a wrong principle, and short of that, whether the award of damages was inordinately so high or low so as to be a wholly erroneous estimate of damages.

16. In awarding damages, the Learned Trial Magistrate stated that he had considered the injuries suffered by the Appellant which injuries were confirmed by the medical report and made no comment on the authorities relied by the Respondent or appellant.

17. In this case, Prof L.N Gakuu, as at 26th September, 2008 found that the Appellant suffered a swollen and tender right knee, elbow and ankle as result of the injury she sustained following the road traffic accident on 19th September, 2008. He opined that, as a result, the Respondent sustained multiple soft-tissue injuries which had then settled after the treatment. These findings are something that would have immense bearing on the award of general damages.

18. The Respondent pleaded in paragraph 9 of the plaint that she could not perform or carry out strenuous task nor lift portable items with her hand, but does not indicate the work she does. This pleading is not sufficient for purposes of loss of earning capacity, which the respondent seeks to introduce in the submissions. Prof L.N Gakuu has not indicated that the Appellant has permanent incapacity and is unable to work. Dr. N. Ongaro as at 26th March, 2009 in his progressive medical report found that the respondent has a swelling at the ankle joint and distal leg and advised ankle support and analgesic to allow healing; there was no indication of permanent disability. Dr. Makali as at 28th March, 2014 found that Respondent suffered injuries classified as maim and assessed permanent disability at 25% based on inability of the respondent to walk for long distances and lift heavy objects. The trial magistrate did not factor all the reports in totality in the general damages awarded to the Respondent. But before I conclude, let me determine the other items of this appeal.

19. On loss of past and future earnings, the Respondent submitted that she was a teacher at Unoa Primary School and was forced to transfer to another school, Kiambaa Primary because of the injuries sustained in the accident. But the specific details or particulars of cost thereof were not provided in the pleading, and every party is bound by her pleadings thus I will not belabour making a finding on loss of earning capacity and of past and future earnings. This was quite a careless impleading and prosecution of a case. It is now trite that submissions cannot plug the gap created by failure by a party to adduce evidence in proof of matters in issue. In **<u>Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR,</u>** the Court of Appeal expressed itself thus in this regard:

> **"...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' *"marketing language"*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."**

See **BONHAM CARTER vs. HYDE PARK HOTEL LTD. (1948) 64 T.R. 177**, where it was stated:

> ***"The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma – v- Nairobi City Council (1976) KLR 297, 304)"***

20. In so far as special damages are concerned, they must be strictly pleaded and proved. A careful perusal of the record clearly reveals that Kshs 244,594.34 under this head of damages were strictly proved and Kshs 254,444 pleaded as required by law, though the calculation of the total indicated in the pleadings comes to Kshs 237,244. **In DOUGLAS ODHIAMBO APEL & ANOR vs. TELKOM KENYA LTD CA**

NO.115 OF 2006 it was stated thus;

> ***.....a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed.....***
>
> ***Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages..”***

The receipts availed to the trial totaled Kshs. 12,220/= which were specifically proved. The special damages of Kshs. 254,444/= is substituted with an award of Kshs. 12,220/=.

21. I am aware that comparable injuries should attract similar awards, but there should be no mechanical application of one case upon another as each case should be determined on its own circumstances. The trial magistrate did not give any weight to the fact that the Doctors were not in agreement that the respondent suffered permanent incapacity. Therefore, the trial court took into account irrelevant factors and acted on wrong principle, thereby, arriving at wholly erroneous estimation of damages. It was so inordinately high. Those are sufficient reasons to disturb the award by the Learned Trial Magistrate. I am guided by the case of **PAUL KIPSANG KOECH & ANOTHER V TITUS OSULE OSORE[2013]eKLR,** where in 2013 the trial court awarded Kshs 750,000/- for general damages for soft tissue injuries and the same was reduced to Kshs 200,000/-. Accordingly, considering the *injuries*, the *pain*, the rate of inflation and the precedents, I set aside the decision by the trial court on general damages and substitute thereof with an award of Kshs. 300,000/- that is *sufficient*. Special damages should be Kshs. 12,220/-. All these shall attract 20% contribution.

22. The appeal succeeds to the extent specifically stated above. The Appellant is awarded half costs of the appeal while the respondent shall have the costs in the lower court.

Dated and delivered at Machakos this 8th day of November, 2018.

D.K. KEMEI

JUDGE