REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 15 OF 2017

T.S.S. COMPANY LIMITED.....APPELLANT

VERSUS

ISAAC HERO MATATIA.....RESPONDENT

(Being an appeal from the judgement/decree by Hon. Ireri M.D. delivered on 20th February, 2017 in Lamu CMCC No. 26 of 2015)

JUDGEMENT

1. The Appellant is T.S.S. Company Ltd and the Respondent is Isaac Hero Matatia. This appeal is limited to the quantum of damages awarded to the Respondent by the trial court. By consent, liability was apportioned at the ratio of 15:85 in favour of the Respondent who was an employee of the Appellant on board its motor vehicle registration number KBT 810V when it was involved in an accident along Lamu-Mpeketoni road while under the control of the Appellant's driver.

2. The trial court upon hearing the Respondent's witnesses and considering the submissions of the parties awarded Kshs. 460,000 as general damages and Kshs. 20,300 as special damages.

3. The grounds of appeal in summary are that the trial court failed to apply the principles applicable in assessment of damages; that the award was manifestly excessive and not in tune with the awards in decisions for comparable injuries; that the trial court failed to take into account relevant factors and consider all the evidence on record; that the trial court erred in invoking Article 159(2)(d) of the Constitution unduly favouring the Respondent by circumventing rules of procedure put in place to aid the attainment of justice; and that the trial court erred in awarding special damages contrary to the mandatory provisions of the Stamp Duty Act.

4. The Appellant urges this court to set aside the award or review it and that the costs of the appeal be borne by the Respondent. In urging re-evaluation of evidence and interference with the trial court's findings, the Appellant leans on the decisions in **Sumaria & another v Allied Industrial Ltd (2007) 2 KLR** and **Selle & another v Associated Motor Boat Company Ltd & others [1968] EA 123**.

5. The Appellant further submits that at the trial the Respondent produced the discharge summary from hospital indicating that he sustained multiple cut wounds, was treated and discharged but he did not produce evidence of further treatment. According to the Appellant the P3 form reflected the injuries as cut on the nasal bridge, cut on the right eyebrow, cut on the occipital ridge and fracture of the upper incisor tooth which injuries were different from those in the medical report produced.

6. To emphasise his point, the Appellant brings to this court's attention the medical report of Dr. Adede filed in compliance with Order 11 of the Civil Procedure Rules, 2010, submitting that it reflected different injuries from the report finally produced in court. According to the Appellant, the report by Dr. Adede indicated that the soft tissue injuries had healed without any residual disability. It was pointed out on behalf of the Appellant that the Respondent had in the course of things made an application to be allowed to produce the latest medical report by Dr. Kamami on account of being unable to procure Dr. Adede as a witness and not because the injuries were more severe than had been indicated.

7. It is the Appellant's position that the report by Dr. Kamami exaggerated the injuries thereby misdirecting the court leading to an erroneous assessment of quantum. The Appellant submits that Dr. Kamami did not treat the patient but simply examined him and that some of the conclusions by the doctor required expert input and were in any case not captured in the hospital discharge summary hence the erroneous conclusion on quantum.

8. The Appellant further posits that the assessment of damages ought to have been on the basis of the Respondent's pleadings and that the pleadings were not amended to reflect the injuries in the medical report that was produced. To buttress this point the Appellant relies on the Nigerian Supreme Court case of **Adetoum Oladeji (NIA) Limited v Nigeria Breweries PLC, SC 91/2002** as cited by the Court of Appeal in the case of **Rift Valley Railways Kenya Ltd v Symon Odhiambo Orita [2015]** where it was held that parties are bound by their

pleadings. The Appellant also relies on the Malawian Supreme Court case of **Malawi Railways Ltd v Nyasulu** as cited in the case of **Hellen Wangari Wangechi v Carumera Muthoni Gathua [2015] eKLR** on the same point that a party is bound by their pleadings.

9. The Appellant urges that the nature and extent of injuries goes to the root of the claim and cannot be boosted by Article 159 of the Constitution. In support of his assertion, reliance is placed on the dissenting judgement of P.O. Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 others [2013] eKLR.**

10. The Appellant points to the case of **Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR** and submits that the damages were reduced from Kshs. 400,000 to Kshs. 150,000 in a case where the plaintiff had suffered far more serious injuries compared to those suffered by the Respondent herein. The Appellant proposes that an award of Kshs. 150,000 is adequate compensation as general damages in the circumstances of this case.

11. The Appellant further urges that the receipts produced did not bear duty stamps contrary to the Stamp Duty Act and hence ought not to have been considered for the purposes of awarding special damages.

12. The Respondent in summary submits that the award was properly granted and the same is not excessive to warrant interference by this court.

13. In exercising its jurisdiction as a first appellate court, this court is mandated to reconsider and re-evaluate the evidence in order to arrive at its own decision, taking into account the fact that the trial court had the opportunity to hear the witnesses testify and observe their demeanour – see **Selle & another** (supra) and **Peters v Sunday Posts [1958] EA 424**.

14. A perusal of the record of appeal shows that the Respondent filed submissions dated 3rd June, 2016 indicating that the injuries were as per the medical report prepared by Dr. Kamami. The Respondent's evidence was that he encounters difficulty in biting food due to the fractured tooth and this was a testament to future medical expenses. It was in addition submitted that he still suffers lower back pains which requires further treatment. Also, that his right eye save for seeing light could not see objects. He urged the trial court to consider the nature of the injuries sustained, their long term effect and the ramifications in making the award.

15. A perusal of the submissions at the trial indicates that the Respondent was of the view that assessment of damages ought to be per each specific injury and classified into different heads. He prayed for Kshs. 1,090,000 in total. He proposed Kshs. 300,000 for the injury to the eye and relied on **Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR** where a sum of Kshs. 100,000 was awarded for injury to the eye leading to loss of vision. He also proposed Kshs. 250,000 for the soft tissue injuries sustained, guided by the finding in **Fast Choice Company Ltd & another v Joseph Wanyiri Mwangi [2011] eKLR** where Kshs. 150,000 was awarded for soft tissue injuries. In addition, he submitted that Kshs.500,000 would suffice for future medical expenses and relied on the finding in the case of **Anne Muriithi, Lilian Kathoki, Naomi Nzisa, Anne Njeru & Jane Syombua v The Headmistress MKS Girls, the Chairman, Board of Governors & Wambua Makau [2003] eKLR** where an award of Kshs. 1.3 million was granted to one of the plaintiffs who had suffered permanent scars that would require plastic surgery. He also relied on the decision of **Rachel Mohamed v Florence Furaha Mkadi & others [1999] eKLR** where the plaintiff was awarded Kshs. 500,000 for chronic back pain that would require intermittent medication.

16. As for further medical expenses with regard to the fractured tooth, the Respondent submitted that Kshs. 40,000 would suffice taking inflation into account. He relied on the decision in **John Mutisya Ngile v Nthambi Paul Mutisya [2006] eKLR** where Kshs. 8,000 was awarded to cater for dentures for a lost incisor tooth.

17. The Respondent filed further submissions stating that Section 19(1) of the Stamp Duty Act is subject to Section 19(3) of the same Act. Further, that the position taken by the Appellant on the revenue stamp was erroneous pointing to the case of **Benedeta Wanjiku v Changwon Cheboi & another [2013] eKLR** in support of that assertion. The Respondent also stated that the receipts had been admitted by consent and the Appellant was therefore estopped from challenging the same.

18. The Respondent concluded his submissions at the trial by urging that the medical evidence indicating serious injuries could not be challenged from the bar as was stated in the case of **Boniface Waiti & another v Michael Kariuki Kamau [2007] eKLR**.

19. The Appellant on its part filed submissions dated 15th May, 2016 submitting that the medical report produced ought to be impugned for reasons that it was at variance with the discharge summary and the pleadings; that the doctor was a general practitioner and did not obtain input from a specialist on the areas covered such as the alleged deteriorating eye sight; and that the Respondent had not, after his discharge, gone for further treatment. To emphasis its submissions the Appellant relied on the English cases of **West (H) & Son Ltd v Shephard [1964] AC 326** and **Lim Pho Cho v Camden & Ishington Area Authority [1979] 1 All ER 332** as cited with approval by the Court of Appeal in **Cecilia W. Mwangi & another v Ruth W. Mwangi [1997] eKLR**.

20. The Appellant urged the trial court to award Kshs. 50,000 being a fair and adequate compensation stating that inordinately high awards would lead to high insurance premiums. This assertion was supported with the decision in **Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR**. In support of the proposed figure, the Appellant relied on the cases of **Peter Muturi Kamata v Muiruri Mungai [2009] eKLR** where an award of Kshs. 50,000 was made for similar soft tissue injuries and **Styroplast Limited & another v Rob Galgalo Bagaja [2009] eKLR** where an award of Kshs. 100,000 was substituted with one for Kshs. 40,000 for similar soft tissue injuries.

21. The record indicates that on 24th May, 2016 consent was entered as follows: that the parties' cases stood closed; that the doctor's attendance receipt for Kshs. 6,000 be produced; that liability be apportioned at 15:85 in favour of the Respondent; that each party had seven days to file and serve submissions; and a mention date was fixed to confirm compliance and fix a judgement date.

22. A perusal of the record also discloses that the Respondent filed a plaint stating that he sustained multiple cut wounds without

specification. He later filed an amended plaint dated 3rd June, 2016 but did not amend the particulars of the injuries. After the parties had closed their cases and filed submissions, the Respondent filed an application to amend the amended plaint so as to reflect the injuries indicated in the medical report stating that the omission to plead the particulars of the injuries sustained was due to inadvertent error. The Appellant filed grounds of opposition stating, *inter alia*, that the application was defective as the *jurat* in the supporting affidavit was contrary to Section 5 of the Oaths and Statutory Declarations Act and that the application was intended to circumvent the terms of the consent.

23. The trial court dismissed the application on account of the *jurat* and the fact that the court would be compelled to set aside the consent in order to entertain the application yet the conditions for setting aside or varying a consent had not been satisfied.

24. In its judgement the trial court agreed with the Appellant that parties were bound by their pleadings but nevertheless went ahead and relied on Article 159(2)(d) of the Constitution and stated that the court should not be strictly bound by pleadings on injuries so as not to occasion injustice. According to the trial court, it was not denied that the Respondent suffered injuries as stated by Dr. Kamami. The trial court also found that the Respondent was cross-examined on the injuries and that the said doctor was also subjected to cross-examination. On those grounds, the trial court found that it could overlook the Appellant's argument and awarded the aforestated general damages.

25. It is a well-established principle of law that a court acting in its appellate jurisdiction can only interfere with the discretion of the trial court under limited circumstances. In **Mbogo & another v Shah [1968] EA 93** the circumstances under which an appellate court can interfere with the discretion of a trial court were outlined as follows:

> **"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

26. Assessment of damages is discretionary. In **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR** the Court of Appeal held that:

> **"Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so low as to make it, in the judgement of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."**

27. That parties are bound by their pleadings is not in doubt. The Court of Appeal emphasized this point in **Rift Valley Railways Ltd v Symon Odhiambo Orita [2015] eKLR** where it referred to its citing of the statement of Pius Adereji, JSC in the Nigerian Supreme Court case of **Adetoum Oladeji (NIA) v Nigeria Breweries PLC SC 91/2002** in its decision in **Independent and Boundaries Commission & another v Stephen Mutinda Mule & 3 others, Civil Appeal No. 219 of 2013**. It important to reproduce the statement:

> **"…it is now a very 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 in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.**
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> **…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

28. Still on this principle, this Court (John M. Mativo, J) **in Hellen Wangari Wangechi v Carumera Muthoni Gathua [2015] eKLR** held that:

> **"It is trite law that parties are bound by their pleadings. This position was correctly captured by the Malawi Supreme Court in the case of Malawi Railways Ltd vs Nyasulu[11] where the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" which was published in {1960} Current Legal Problems at Page 174 where the author stated:-**
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> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party by is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice……***
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> ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and***

neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "any other business" in the sense that points other than those specific may be raised without notice.""

29. In my view, Article 159(2)(d) of the Constitution looks into procedural technicalities only and cannot be used to upset the principle that parties are bound by their pleadings. However, in this case the particulars of injuries pleaded in both the original and amended plaint were **"multiple cut wounds."** The evidence adduced by way of the discharge summary talked of multiple wounds. The evidence of Dr. Kamami and the Respondent only detailed the nature of those cut wounds. The injuries referred to by Dr. Kamami in his report were recorded in the P3 form which was produced as an exhibit by consent of the parties. The evidence adduced was therefore in support of the injuries sustained and pleaded. The injuries pleaded in the amended plaint were established through the evidence adduced. Though it was not necessary for the trial court to make reference to Article 159(2)(d) of the Constitution, there was no error in the magistrate's decision as to the nature of injuries sustained by the Respondent.

30. In assessing quantum, a guiding principle is that comparable injuries should as far as possible be compensated by comparable awards. This principle was stated by the Court of Appeal in **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** thus:

"On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries."

31. The amended plaint reflects that the Respondent suffered multiple cuts and the evidence produced attests to this. In **Paul Kiviu Nzuma & another v Jackson Mwilu [2006] eKLR** the 1st plaintiff who suffered a cut on right occipital region, injury to the scalp, blunt injury to the left shoulder joint, multiple bruises and cut wound on the shins and needed to attend physiotherapy was awarded Kshs. 200,000. The 2nd plaintiff who suffered soft tissue injuries with no permanent incapacity save for back pains was awarded Kshs. 60,000. This is a decision made over ten years ago and inflation must be taken into account when relying on the decision. In **Francis Ochieng & another v Alice Kajimba [2015] eKLR**, the Court awarded Kshs. 350,000 for soft tissue injuries stating that the injury to the head had aggravated the injuries.

32. An award of Kshs. 460,000 for the kind of injuries sustained by the Respondent cannot be said to be inordinately high to warrant interference by this court. The award may have been on the higher side but the trial magistrate applied the correct principles in making the award. I therefore find no reason for disturbing the general damages awarded.

33. As for the issue of production of receipts that did not bear revenue stamps as required by the Stamp Duty Act, I find that the Court of Appeal settled this issue in **Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR** when it held that:

> **"21.The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR** where it stated thus:
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> "**Mr. Mbigi submitted that the guarantee document relied on by the respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the Stamp Duty Act. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -**
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> ***"The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case*** *of Suderji Nanji Ltd. -vs- Bhaloo* ***(1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854 that:***
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> ***"before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ……***
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> ***The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the*** **unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/respondent and he must be given the opportunity".**
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> **We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof."**

34. The production of the receipts was not objected to by the Appellant so that the Respondent could be accorded an opportunity to pay the revenue. In my view, the horse has already bolted hence the Respondent proved the special damages specifically pleaded totaling Kshs. 20,320 as held by the trial court.

35. The upshot is that this appeal lacks merit. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT