REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 68 OF 2013

ALEX OGUTU.....APPELLANT

VERSUS

P N M N (minor suing through her next friend and mother

E N P.....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court at Kilungu Law courts delivered by ***Hon. P. Nyakweba (Principal Magistrate)*** *on 20th March, 2015- at* ***KILUNGU P.M.C.C. No. 104 OF 2010)***

JUDGMENT OF THE COURT

1. The appeal arises pursuant to the judgment delivered by Hon H. Nyakweba Principal Magistrate in Kilungu Senior Resident Magistrate's court civil case No. 104 of 2010 on the 20th March 2013.

2. Brief background of the matter is that the Respondent herein filed a plaint dated 1/12/2010 in which she sought for both general and special damages for injuries sustained in a road traffic accident on the 6/07/2010 while travelling as a fare paying passenger in the Appellants motor vehicle registration number KBC 351 R make Toyota Hiace along Kalongo – Nunguni road. Parties through their learned counsels entered into a consent on liability at the ratio of *15% to 85%* in favour of the Respondent as against the Appellant. The parties further agreed all claim supporting documents were to be produced on record by annexing them to the parties respective written submissions so that the court could determine the issue of quantum of damages. The Respondent was thereafter awarded general damages of Kshs.250,000/= which was to attract *15%* contributory negligence. Special damages of Kshs. 800/= were awarded. The Respondent was finally awarded a net sum of Kshs.213,000/= together with costs and interest.

3. The Appellant being dissatisfied with the said judgement on quantum filed the current appeal. The Memorandum of Appeal dated 15/04/2013 was later amended on the 10/03/2014 and which raised 4 grounds of appeal namely:-

> ***(a) The learned Principal Magistrate erred in law and in fact by making an award on general damages which was manifestly excessive given the injuries sustained by the Respondent and the relevant case law produced by the Respondent supporting medical report dated 27/08/2010 filed in court on 16/1/2013 and served upon the Appellant.***
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> ***(b) The Learned Principal Magistrate applied wrong principles of law in assessing general damages by relying on a new medical report that had not been filed in court and/or served upon the Defence in accordance with Order 3 Rule 2 (c) of the civil Procedure Rules thus arriving at***

manifestly excessive damages.

(c) The Learned Principal Magistrate erred in law and in fact by ignoring the Appellant's submissions in his judgment without proper reason to do so.

(d) The Learned Principal Magistrate erred in law and in fact by giving an award on general damages at all because evidence produced was for amputations and did not support the pleadings which were for soft tissues as its trite law that a party is bound by its pleadings.

4. The Appellant prays that this Honourable Court to allow the appeal and set aside the lower court's judgment on quantum and substitute it with fair judgment on quantum that it deems fit or dismiss the Respondent's claim altogether with costs of the appeal to the Appellant.

5. With the leave of the court, parties field written submissions which I have carefully considered.

6. This being a first appellate court, its duty is to re-evaluate and re-analyze the evidence tendered before the trial court. However it is noted that no evidence was tendered before the trial court. The parties recorded a consent on liability in the ratio of *85% to 15%* in favour of the Plaintiff against the Defendant. The parties further agreed to file written submissions and annex claim supporting documents and then let the court proceed to give judgement on quantum of damages. Counsel for the Respondent had submitted that a sum of Kshs.750,000/= as general damages would be adequate and had relied on several authorities namely (1) **PELICAN ENGINEERING CONSTRUCTION CO. =VS= DANIEL NGUNJIRI GITHENDU – NBI HCCA. 388 OF 1999** where a sum of Kshs.440,000/=was awarded for amputation of left thumb, amputation of left index finger, amputation of left mid phalanx and amputation of ring finger. On the other hand counsel for the Appellant had proposed a sum of Kshs.60,000/= as general damages and relied on two cases namely (1) **KPLC & CO. LTD =VS= SAMSON MACHUMA MAKORI [2008] eKLR** where soft tissue injuries on face, chin, rib cage and knee attracted an award of Kshs.80,000/= (2) **CAROLINE KABAE =VS= NANCY MUHTONI [2010] eKLR** where blunt injuries on forehead, anterior chest and left attracted an award of Kshs.80,000/=.

As no evidence was tendered by the parties in the lower court, regard has to be resorted to the pleadings. The plaint dated 1/12/2010 paragraph 6 described the Respondent's injuries as cut wound on left 1st finger and cut wound on 2nd left finger. The documents in support of the claim were annexed to the Respondent's counsel submissions and which comprised a certificate of birth, copy of records, outpatient card and treatment notes, P.3 form, a police abstract and a medical examination report. These documents were considered by the trial court and more specifically the medical report by Dr. Kimuyu dated 27/08/2010. The trial court relied on the medical report and the case of **PELICAN ENGINEERING CONSTRUCTION COMPANY =VS= DANIEL NGUNJIRI GITHENDU – NBI HCCA NO. 388 OF 1999** and proceeded to award the Respondent general damages of Kshs.250,000/= for pain and suffering.

7. The Appeal herein is solely on quantum of damages awarded by the trial court. The appellant now wants this court to interfere with the lower court's award. The Appellant's Counsel has submitted that the award be interfered with since the injuries sustained by the Respondent were soft tissue in nature with no permanent disability and further that the trial court relied on a medical report that had different injuries than the one filed as part of the Respondent's list of documents and thereby arrived at an erroneous award which was manifestly excessive. The counsel for the Respondent defended the award of the trial court and submitted that the Respondent's injuries were seen by the trial court when parties entered a consent on liability and hence the trial court properly arrived at a sound award.

Indeed an Appellate court has to consider that issues of awards of damages by lower courts are usually through exercise of discretion by those courts and that they should not be interfered with as a matter of course. The Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES AND ANOTHER = VS= A. M. LUBIA AND ANOTHER [1982 – 1988] KLR 727** and at page 703 stated:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the court only if it is satisfied that that the trial court applied the wrong principles (as by taking into account some relevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low so as to represent an erroneous estimate."

After analyzing the Appellants Grounds of Appeal and the Written Submissions of the Learned Counsels for the parties herein, I find the main issue for determination is whether the trial court relied on an irrelevant factor namely a separate medical report than the one filed as part of the Respondent's list of documents and as a result ended up awarding general damages that was not commensurate with the injuries sustained by the Respondent. In order to determine this issue, there is need to check the record of appeal. The plaint dated 1/12/2010 vide paragraph 6, the Respondents injuries were listed as (a) cut wound on left 1st finger and (b) cut wound on left 2nd finger. This is indicated on page 6 of the record of Appeal. The medical report is listed as number 7 on the Respondent's list of documents which is on page 19 of the record of appeal and that the same is found on page 30 of the Record of Appeal where the report prepared by Dr. Kimuyu examined the Respondent on 27/08/2010 and noted the two cut wounds on left 1st finger and left 2nd finger and proceeded to form the opinion that the Respondent suffered soft tissue injuries and had satisfactorily recovered. The new medical report annexed to the Respondent's Submissions seems to have different diagnosis as regards the Respondent's injuries as pleaded in the plaint and as noted in the earlier medical Report. Indeed the new documents introduced severe injuries allegedly suffered by the Respondent such as amputation of the two fingers and that there was a permanent disability of 10%. The said new medical report emanates from West End Medical Solutions ltd whereas the one filed and served by the Respondent as part of her list of documents emanated from Ministry of Medical Services Machakos Level Five Hospital. Curiously both documents indicate the date of examination as 27/08/2010 and said to have been prepared by Dr. Kimuyu. If indeed the reports were made on the same day, then the Respondent was under obligation to seek leave of court to file further list of documents and ensure that the Appellant was duly served and invited to respond thereto. The Respondent was bound by her previous pleadings as filed and served and could only depart and introduce new ones with the leave of the court. The reason behind this is to ensure that all parties are on an equal footing and that no party should be allowed to steal a match from the unsuspecting party. The authority in **CATHOLIC DIOCESE OF MERU =VS= REGINA MUNANIE MUTINDA [200] eKLR** is relevant herein and in which Emukule – J stated:-

"***The rule is well grounded on the principle of full disclosure that the party knows in advance the challenge he/she is likely to meet in court and need not be taken by surprise or be ambushed."***

It is therefore quite clear that the learned trial magistrate relied on the new medical report which indicated severe injuries sustained by the Respondent and arrived at the award which is now complained of. Had the trial Magistrate been made aware of the earlier medical report which had been filed and served by the Respondent and which indicated injuries as soft tissue with no permanent disability, he would have arrived at a different award. In the premises it is the finding of the court that the learned trial magistrate had taken into account an irrelevant factor in the assessment of damages and thereby arrived at an erroneous estimate. The same therefore has to be interfered with by this court and to take note of the decision in ***BUTLER =VS= BUTLER*** as quoted in the case of **MAYFLOWER LTD =VS= DORIS NYACHERA NYACHAMBA [2010] eKLR** where it was held:-

"***Assessment of damages is an exercise of discretion and an Appellate court will be slow to reverse the decision of trial magistrate unless he either acted on wrong principle or awarded so excessive or little damages that no reasonable court would, or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision."***

8. Upon perusal of the record of appeal and the lower court, it emerges that the Respondent had sustained

cut wounds on left 1st finger and left 2nd finger and that according to Dr. Kimuyu in his report dated 27/08/2010 and which was filed as part of the Respondent's List of documents, the injuries were of soft tissue in nature with no permanent disability. The counsel for the Appellant has submitted that an award of Kshs.60,000/= be awarded since injuries were soft tissue in nature. In the case of **CAROLINE KABAE & ANOTHER =VS= CAROLINE WANGECHI NJOORA - NYERI HCCA NO.38 OF 2009** Justice Sergon awarded the Plaintiff who had sustained blunt injuries to the head, anterior chest, lower back, left hip and left leg general damages of Kshs.80,000/= for pain and suffering. This decision was made on 19/05/2010. The authority is fairly recent and Respondent's injuries are more or less similar as they were soft tissue in nature with no permanent disability. In the circumstances, I find the award arrived at by the trial magistrate of Kshs.250,000/= was manifestly excessive and I hereby set aside the said award of Kshs. 250,000/= and substitute it with an award of Kshs.80,000/=. I wish to point out that I have also considered the effect of inflation on the value of the Kenyan Shilling. The award of special damages has not been challenged and therefore the same sum of Kshs.4, 700/= shall remain undisturbed.

9. The upshot of the aforegoing is that the Appeal succeeds. The same is allowed as proposed herein above. I award half costs of this appeal to the Appellant and I award costs in the court below to the Respondent with interest from the date of the lower court's judgment.

It is so ordered.

Dated, signed and delivered at Machakos this.**5TH** day of **APRIL** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Mutuku for Appellant .....

Mburu for Kimeu for Respondent.....

.C/A: Munyao.....