REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 415 OF 2010

MILIMANI LAW COURTS

MICHAEL KARIUKI MUHU ……..APPELLANT

VERSUS

CHARLES WACHIRA KARIUKI ……1ST RESPONDENT

ARROW CHEMIST LIMITED …….2ND RESPONDENT

JUDGMENT

This is an appeal from a decision of the Chief magistrate at Milimani Commercial Courts, Nairobi Honourable Mr S.N. Riechi (as he then was) delivered on 22nd September 2010 in Civil Suit No. 12724 of 2006.

Brief facts of the case in the lower court are that the appellant Michael Kariuki Muhu who was the plaintiff filed suit against the respondent/defendant Charles Wachira Kariuki seeking general damages for pain and suffering and loss of amenities for the injuries sustained in a road traffic accident involving motor vehicle registration No. KAR 026W belonging to and being driven by the 1st defendant.

The plaintiff/appellant alleged that on or about the 14th day of July 2006, he was a lawful pedestrian along Nairobi-Magadi road when, due to the negligence or recklessness of the 1st defendant, in the manner in which he drove the said motor vehicle, it knocked him as a result of which he sustained serious injuries.

The defendants filed a defence denying the plaintiff's claim and pleading contributory negligence against the plaintiff.

In a judgment delivered on 22nd September 2010 by S.N Riechi Chief Magistrate (as he then was) the trial magistrate dismissed the plaintiff/appellant's suit on the ground that he was the one to blame for the occurrence of the accident and not the defendant after admitting that he had taken alcohol.

It is that judgment which the appellant was dissatisfied with and therefore filed this appeal setting out 5 grounds of appeal namely:-

1. That the learned trial Chief magistrate erred in law and in fact in dismissing the plaintiff's claim in its entirety against the weight of evidence tendered before him.
2. That the learned Chief Magistrate erred in law and in fact in giving credence to unpleaded matters that were not in issue.

3. That the learned Chief Magistrate erred in law and in fact in relying wholly on uncorroborated evidence of the first defendant.
4. That the learned Chief Magistrate erred in law and in fact in totally ignoring the evidence of PW2, PW3 and the plaintiff's written submissions both on the issues of liability and quantum.
5. That the learned Chief Magistrate erred in law and in fact in suggesting an award of damages that was manifestly low in light of the injuries suffered by the appellant.

The appellant prayed that the appeal be allowed with costs both on liability and on quantum.

The draft amended plaint dated 18th September, 2007 alleged that on or about the 14th day of July 2006, he was lawfully walking along Nairobi –Magadi road when the 1st defendant/respondent with the authority and in the cause of his employment with the 2nd defendant/respondent, so negligently, carelessly and or recklessly drove, managed and or controlled the motor vehicle registration No. KAR 026W that he caused the same to lose control and violently knock down the plaintiff and as a result of which the plaintiff sustained severe bodily injuries, endured and continues to endure pain and has suffered loss and damage.

The particulars of negligence on the part of the 1st defendant are particularized as:

a. Drove motor vehicle registration No. KAR 026W at a speed that was too fast in the circumstances.
b. Failed to have any or any proper control of the motor vehicle registration No. KAR 026W.

The plaintiff alleged that by reason of the matters/acts of negligence above, he sustained severe bodily injuries and suffered loss and damage.

The injuries allegedly sustained involved

a. Deep cut would right forehead.
b. Blunt head injury.
c. Blunt trauma to the left hip.

He prayed for judgment for general damages for pain, suffering and loss of amenities and special damages of 2,700 together with costs of the suit and interest.

The defendants filed defence on 27th December 2006 denying the entire claim by the plaintiff. They also denied that the accident occurred on 14th July 2006 involving motor vehicle KAR 026W and the plaintiff or at all. They also denied particulars of negligence attributed to them and pleaded contributory negligence on the plaintiffs part to wit, for:

a. Walking on the road in the path of travel of motor vehicle KAR 026W.
b. Having little or no regard for his own safety.
c. Ignoring the defendant's warning and hooting to get off the road.
d. Suddenly and without notice jumping on the path of travel of motor vehicle KAR 026W.
e. Causing obstruction to the said vehicle.
f. Having little or no regard for other road users.
g. Being a danger to himself and to other road users.
h. Failing to observe the highway code by attempting to cross road when it was not safe to do so.

The plaintiff filed reply to defence dated 15th January 2007 denying all and every allegations contained in the defence and issues with the defendant defence while reiterating contents of the plaint.

After filing of the amended plaint enjoining the 2nd defendant , the Arrow chemists Ltd, it entered appearance on 22nd October 2007 denying each and every claim including the allegation that it owned motor vehicle KAR 026W, that it was involved in an accident as pleaded; that it was vicariously

liable for acts of the 1st defendant in negligence as alleged or at all and put the plaintiff to strict proof thereof.

Analysis and determination

This being the first appeal, Iam enjoined to consider the evidence in the court below and the entire record in detail which is a requirement under Section 78 of the Civil Procedure Act which mandates this court being the first appellate court to evaluate and examine the lower court record and evidence and arrive at its own independent conclusion. This principle was well espoused in the case of **Selle vs Associated Motor Boat Company Ltd (1968) EA 123** where sir Clement De Lestang stated that:

> ***" This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.***
>
> ***However, this court is not bound necessary to follow the trial judges findings of fact if it appears either that he had 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) Hammad Sarif vs Ali Mohammed Solan (1955) 22 EACA 270."***

I am also conscious in determining this appeal, of the principle set out in **Mbogo vs Shah & Another (1968) EA 93** where the court set out circumstances under which an appellate court may interfere with a decision of the trial court thus:-

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

Applying the above principles and reexamining the record in the lower court, the case in the lower court proceeded to hearing on 27th July 2010 with the plaintiff calling 3 witnesses himself inclusive. PW1 Doctor George Kungu Mwaura testified that he examined the plaintiff on 15th September 2008 and prepared a medical report showing the injuries sustained by the plaintiff following a road traffic accident on 14th July 2006. The injuries involved;

a. Deep cut wound on the forehead.
b. Blunt left hip injury.
c. Suffered pain and blood loss.

The plaintiff /appellant was treated at Kenyatta National Hospital. He relied on P3 form, previous medical report by Doctor Kiama Wangai. He found that the plaintiff had healed scars in the injured are which consisted of soft tissue injuries. He charged the plaintiff shs 2000 for the medical report and produced the medical report and receipt. He concluded that the plaintiff/appellant had healed completely.

The plaintiff/appellant testified that on 14th July 2006 he was at Nkoroi area walking from the shops going home, along Magadi road near Kamura market towards Nairobi on a two way road when motor vehicle KAR 026W from Magadi to Nairobi came from behind him and hit him. The motor vehicle driven took him to Kenyatta National Hospital. He was with a female passenger. The plaintiff was treated and discharged. He produced attendance card and receipt for 600/-. He then reported the matter to Ongata Rongai Police Station and was issued with a P3 which was filled by a doctor. He was also issued with a police abstract for which he paid shs 200/-. He searched for ownership of the accident motor vehicle and produced copy of records showing Arrow Chemist Ltd and paid shs 500/- which

he produced in evidence. He denied that he was walking on the road and or that the driver hooted but that he refused to move away. He blamed the driver of the motor vehicle because he left his side of the road and hit the plaintiff from the latter's side. He sustained injuries on the head and leg.

On cross examination he stated that the accident occurred at about 8.30pm and there was moonlight so he was seeing where he was going. He recalled that it was on a Friday but denied that he had taken alcohol. He admitted that DMF1attendance card from Kenyatta National Hospital was his, showing that he was fully conscious, smelling alcohol which he had taken in the morning and that he was only smelling. He denied that he was staggering on the road. He stated that the motor vehicle had lights on but he did not hear its sound. He stated that he had not healed from the injuries which included the left leg.

The plaintiff/appellant further called PW3 John Irungu Kamau who testified that he knew the plaintiff as his job partner. That on 14th July 2006 at8.30pm at the stage opposite Mbeere along Magadi /Nairobi road, the plaintiff was hit by a motor vehicle. That the plaintiff was ahead of the plaintiff about 10 metres and they had stopped for a short call of nature when the plaintiff was hit by motor vehicle KAR 026W which was moving in a zigzag manner and it came to their side of the road.

On being cross examined by Mr J.K. Mwangi advocate, the witness stated that he was together with the plaintiff but the witness remained behind and heard the plaintiff screaming. He stated that they did not live together and that the plaintiff was not drunk. That they both did welding work and were together the whole day and the plaintiff did not inform him that he had drank in the morning. That he saw the plaintiff lying down next to the vehicle.

At the close of the plaintiffs case the 1st defendant testified that on 14th July 2006 he was driving motor vehicle KAR 026W Peugeot 406 Saloon from Kiserian at about 8.30pm with a passenger E.K. Musela.As he approached Nkoroi he noticed a figure staggering towards the road from his left side. He slowed down, hooted but the man appeared to continue crossing. He swerved to the right of the road, moved the car off the road and he stopped. That the man staggered and fell on the car and fell on the pavement on lose stones. He denied hitting the plaintiff as he had stopped and the man was extremely drunk. The pedestrian sustained a small cut on the forehead. DW1 took him to Kenyatta National Hospital where he was making noise and staggering. That he was smelling alcohol. He paid for his treatment and X-ray was taken. DW1 produced the plaintiff's treatment card as DEX1 which showed that the plaintiff was conscious and smelling alcohol.

In cross examination by Mr Mwangi advocate, the 1st defendant responded that it was the plaintiff who fell on his car when he had already stopped on the right side of the road from Magadi and that he swerved to the right as the man was walking from the left. He confirmed the injury on the forehead and denied that he caused the accident. He stated that he was a pharmacist. That the plaintiff smelled alcohol although no tests were taken to establish the level.

The parties advocates filed and exchanged written submissions. In his submissions dated 25th August 2010, the plaintiff's advocates contended that from the evidence, the plaintiffs and his eye witness were more credible than the 1st defendant as no evidence was tendered to prove whether the plaintiff was intoxicated and or the degree of intoxication.

In his view, the first defendant was entirely to blame for the accident but that the plaintiff was willing to concede 10% contribution in the circumstances.

On quantum, the plaintiff prayed for an award of shs 180,000/- general damages and shs 3700/- specials proven and shs 5000/- doctors attendance charges. He relied on **HC 2886/1005 Jane Njoki Muraya & Another vs Alice W. Kimai & another** (AminJ in 2001 who awarded shs 150,000/- to the plaintiff who sustained injuries involving

a. Soft tissue injuries to the left shoulder.
b. Soft tissue injuries to the left anterior chest wall.

c. Soft tissue injuries to the left hip.

The defendants filed their submissions on 17th August 2010 and on liability they submitted that the plaintiff was solely to blame for the accident as he was drunk and staggered on the road, which fact of drunkenness he hid it from the court by failing to produce his treatment records at Kenyatta National Hospital which showed he was drunk.

It was submitted on behalf of the defendants that the plaintiff had not proved his case against the defendants on a balance of probabilities and prayed for dismissal of the suit with costs.

Further, that PW3 **John Irungu Kamau** was a valueless witness to the plaintiff since he did not witness the accident.

On quantum, the defendants submitted that the plaintiff would be entitled to shs 50,000 general damages relying on the cases of **Esther Nyambura Munyu vs Christopher Muteti HCC 1780/90** where he plaintiff sustained injuries involving multiple bruises on the neck, head, left ear, right shoulder, left hip and laceration on the forehead.

And **HCC1313/87 Francis Murimi Kariuki vs Samwel Njoroge (Nairobi)** where the plaintiff sustained cut wounds on the head, trunk and lumber region and was awarded shs 50,000.

The trial magistrate dismissed the plaintiffs case on the ground that the plaintiff was responsible for the accident as he was drunk and staggered on the road. He also found that had the plaintiff proved his case on liability he would have awarded his kshs 70,000/- general damages.

That is the record that provoked this appeal. This appeal was admitted to hearing on 22nd September 2011 and directions given on 1616/2014 and directions given on 16th June 2014 by Honourable Waweru J. The parties advocates appeared before me on 7th October 2014 and agreed to file written submissions to dispose of the appeal herein.

The appellant's submissions dated 30th October 2014 whose gist is that the trial magistrate erred in dismissing the appellant's suit on the basis that he was intoxicated which fact was not pleaded nor was there medical evidence on the issue of intoxication if at all.

Further, that DW1's evidence was not corroborated by an independent eye witness yet he admitted having a passenger G.K. Musera who he did not call as a witness in the case. On the other hand, that the appellant called an eye witness John Irungu Kamau who supported his evidence hence the matter should be remitted back to the lower court for hearing before any magistrate.

The respondent on the other hand submitted that there was no merit in the appeal and supported the trial magistrate's findings. Further, that there is no requirement for corroboration of the defence witness evidence. They prayed for dismissal of the appeal with costs to the appellants.

Flowing from the 5 grounds of appeal, the evidence on record in the lower court, submissions and pleadings, and the submissions of the respective parties in this appeal, these are 2 issues for determination:

a. Whether the appellant proved his case against the respondents on a balance of probability.
b. If so, how much quantum was the appellant entitle to.

<u>On issue No. 1</u> which touches on liability, the law is trite that the person who alleges must prove. Under Section 107 of the Evidence Act , (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence o facts which he asserts must prove that those facts exists".

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on

that person.

Under Section 108 of the said Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Under Section 109 thereof " 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."

Applying the above law to the appeal herein, it is clear that the burden of proving liability for the occurrence of the accident in question, which accident, from the evidence adduced in the lower court is not denied save for the manner in which it occurred, lay with the appellant throughout the trial and it never shifted to the respondents who had no counter claim in the suit against the appellant.

The appellant's evidence on the occurrence of the accident was that it was at 8.30pm which fact was admitted by the 1st defendant/respondent, he also stated that he was lawfully walking on the road when the defendant's motor vehicle KAR 026W left its side of the road and hit him when he was on his side of the road. He was injured on the head and leg and the 1st defendant took him to Kenyatta National Hospital for treatment where he was treated and discharged.

The defendants on the other hand contended that the accident was solely caused by the appellant who was staggering on the road while drunk and that the 1st defendant who was the driver of the accident motor vehicle had stopped on the right side of the road after swerving to avoid hitting the appellant who had staggered into the road and that he (the appellant) hit himself on the car after it had stopped, not that the car hit him. Further , that when the 1st defendant came out of the car he found the appellant drunk and smelling alcohol, which fact was recorded in the hospital treatment notes at Kenyatta National Hospital but which card the appellant did not produce in court, prompting the defence to produce it as defence exhibit. Further, the defence/respondents contended that the appellant's witness PW3 did not corroborate the appellant's evidence as he did not witness the accident, having testified that he only saw the appellant lying down.

The appellant maintains that the defence evidence was not corroborated and that the fact of drunkenness was not pleaded or proved by medical evidence hence the magistrate erred in relying on that fact of drunkenness of the appellant which was not proved by the respondents to dismiss the appellant's suit.

From the evidence as summarized above and reproduced in detail in this judgment, I find that the appellant did not prove his case against the respondents against the respondents on liability on a balance of probabilities for the following reasons:-

1. That the respondent did not have to specifically plead the appellant's drunkenness as it was the appellant himself who admitted in cross examination that he had taken alcohol although he denied being drunk at the time of accident as he allegedly took alcohol in the morning.
2. That when the appellant was taken to Kenyatta National Hospital after the accident, he was treated and discharged but he did not produce the hospital treatment card for that delay which showed that he was conscious and smelling alcohol, which evidence the respondents relied on to show that the appellant was drunk and staggered across the road.
3. That albeit there was no medical tests taken and produced on whether or not the appellant was intoxicated, his conduct of failing to produce his medical records which showed that he was smelling alcohol is an indication that he was hiding evidence which would work against him had he produced it, as was enunciated in the case of **Bukenya vs Uganda (1972) EA 549.**

4. The appellant offered no explanation why he did not produce his initial treatment notes from Kenyatta National Hospital yet that was a primary document for his case and he only mentioned it during cross examination while admitting that it was his document issued by Kenyatta National Hospital.

In **Green Palms Investments Ltd vs Kenya Pipeline Company Ltd Mombasa HCC 90/2003** the court held inter alia, that failure by a party to call as a witness any person (or evidences whom (which) he might reasonably be expected to give evidence favourable to him may prompt a court to infer that the persons' evidence would not have been helpful to the party's case and would have been prejudicial to the case and the witness or evidence may have technically been avoided to escape being embarrassed on cross examination.

In this case, it is clear that this being a civil case, the appellant was expected to prove his case against the respondents on a balance of probabilities not beyond reasonable doubt.

It was therefore the duty of the appellant to prove throughout the trial, even if his case proceeded on formal proof, or the defendants/respondents chose not to testify that the defendants were responsible for the accident.

4. The defendant's in my humble view, did not have to prove anything and by the appellant requiring that they produce medical evidence to show/prove that the appellant was intoxicated at the time of the accident was to miss the point by shifting the onus of proving negligence or liability to the defendant who had denied the manner in which the accident occurred and even gone ahead to demonstrate how the accident occurred.
5. In addition , for the appellant to demand that there should have been corroboration of the 1st defendants' testimony by calling the passenger who was admittedly with the 1st defendant during the material accident is also to miss the point. The 1st defendant testified uncontroverted evidence that he had swerved to the right side of the road and stopped when the appellant staggered and hit himself on the car and fell. This evidence was not challenged and in my view, explains the reason why the appellant only sustained minor injuries involving a cut on the forehead as shown by the P3 form and treatment notes from Kenyatta National Hospital.
6. In my view, had the 1st defendant crushed the appellant as he would wish this court to believe, the impact would have been greater and the injuries would have been more serious than the minor injuries sustained by the appellant.
7. Furthermore, the appellant's witness PW3 in my view, did not witness the accident when it occurred after he admitted in cross examination that: ***"I only saw him lying down" and that "we were together but I was behind when I heard plaintiff screaming."***

In PW3's evidence in chief, he did not mention that he saw the plaintiff/appellant being hit by the motor vehicle. Pw3 testified that: " ***there was a motor vehicle from Magadi side." We were on the other side of the road. I had stopped to urinate when the plaintiff was hit by motor vehicle KAR 026W."*** He does not state how far he was from the appellant. He further stated that the motor vehicle was moving on a zig zag manner. The question is, how did he see a motor vehicle which came from behind him move in a zig zag manner? The appellant on the other hand testified that ***" the motor vehicle came from behind and knocked me."*** If PW3 was behind the appellant and the appellant says the motor vehicle came from behind him and knocked him when he was on the right side of the road facing Nairobi, no doubt, this court believes the 1st respondent's testimony that he swerved to the right to avoid hitting the appellant who was staggering from the left side of the road crossing to the right. If that were not the case, then the question is, how did the appellant find himself on the right side of the road facing Nairobi, the same direction where the motor vehicle was going, as opposed to walking on the left side of the road towards Nairobi the direction where the motor vehicle was going? Those questions leave no doubt that the appellant had staggered to the right side of the road.

In addition , this court finds it hard to believe PW3's evidence that he was walking with the appellant from work for reasons that the appellant himself in his evidence never mentioned that he was walking with PW3 at the time of the accident or that the latter was his acquaintance at the time of the accident. If PW3 was the appellant's workmate and both had left work together and were proceeding home, this court wonders why in his evidence, PW3 does not mention anything to do with the events after the appellant was hit including how and who took the appellant to hospital after the accident. It is unbelievable that the PW3 could have been at the scene of accident and could say nothing concerning the

people who took the appellant to hospital that night or even accompany the appellant to hospital but instead left him alone with strangers who had knocked him.

It is highly doubtful that that would have happened without any explanation. Additionally, the police abstract too does not mention PW3 as a witness to the material accident and neither does PW3 state that he recorded any statement with the police following the accident which he witnessed.

The question that arises is why did PW3 who was the appellant's **"workmate"** and who **"witnessed"** an accident which happened at night not offer to record a statement with the police or even take down the vehicle registration number? Neither were the police who received the report of the accident called to testify on the investigations which they were still carrying out according to the police abstract produced to shed light on what kind of report they received concerning this material accident; and by whom; or who recorded statements on its occurrence; and; or who was to blame for the accident in their estimation; now that there was no evidence that any of the parties involved were charged with any traffic offence.

In my view, therefore, it was never the duty of the respondent to prove how the accident occurred. On the contrary, it was the duty of the appellant to prove on a balance of probabilities that the respondents were negligent or contributed to the occurrence of the accident as pleaded in the plaint. The general burden of proof lay on the appellant because in order to obtain judgment, he had to establish on a preponderance of evidence. The evidence adduced by the appellant fell short of that and left serious doubts as to whether the respondents were in any way responsible or even contributed to the occurrence of the accident. I reiterate that the 1st respondent's explanation that he only swerved to the right side of the road and stopped to avoid the appellant and that the appellant staggered and hit his head against the respondent's car is more plausible and acceptable in the circumstances of this case than the appellant's version.

The appellant as a pedestrian walking on a public road at night was under a duty to take care of his own safety. He did not and instead endangered his own life by staggering into the road in a drunken state, having admitted that he had taken alcohol. He also attempted to conceal the evidence that on a balance of probabilities tendered to prove that he was intoxicated at the material time which factor, most probably contributed to his staggering and crossing the road without ensuring that it was safe for him to do so.

I find that there was absolutely no evidence on the record to show that the 1st respondent was careless in his manner of driving the motor vehicle at the material time and or that he actually knocked the appellant. There was no credible evidence as to how careless the the 1st respondent drove the motor vehicle, having dismissed PW3's evidence as being farfetched, contradictory and unreliable and devoid of corroborating the appellant's testimony.

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

The second issue is on quantum of damages. The trial magistrate found that had the appellant proved his case against the respondents on liability , the court would have awarded him shs 70,000/- general damages for pain and suffering . In so doing, the trial magistrate considered the injuries sustained by the appellant which were described as minor soft tissue injuries and which had completely healed.

The appellant complains in his grounds of appeal that the trial magistrate ignored the written submissions and awarded damages which were manifestly low in light of the injuries suffered by the appellant.

It is worth noting that awarding damages is the discretion of the trial court, which discretion is required to be exercised judicially. In **Denshire Muteti Wambua vs KPLC Ltd (2013) e KLR** the Court of Appeal observed that " ***further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that is comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd vs Bimomo &* 2 Others (*2004) 2 KLR 101)"***

In **Rosemary Wanjiku Kungu vs Elijah Macharia Githinji & another (2014) e KLR** the court held inter alia, that

" …….in awarding damages the general picture , the whole circumstances,, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the 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 just amount, so far as money can ever compensate , and entering the realms of very high awards, which can only in the end have a deleterious effect."

In this case, the appellant had sought kshs 180,000/- general damages relying on the case of **Jane Njoki Muraya & another vs Alice W Kimani & Another (supra)** whereas the respondents had proposed shs 50,000 relying on **Esther Nyambura Munyiri vs Christopher Muteti (supra) and Francis Kariuki vs Samuel Njoroge (supra)**

The trial magistrate nevertheless did not consider or make reference too any of the cited cases or even make any comparisons in driving at a figure a shs 70,000/- general damages. He only referred to the injuries sustained by the appellant and as per the treatment notes from Kenyatta National Hospital and medical report by Doctor G.K. Mwaura.

That notwithstanding, I find that the indeed the injuries sustained by the appellant were minor soft tissues. The treatment notes from Kenyatta National Hospital only show a cut on the left side of the forehead and the P3 filed 11 days after the injury show an additional swelling and injuries on the upper limb (left thigh).

The pleadings particularized the injuries as

a. Deep cut wound right forehead
b. Blunt head injury
c. Blunt trauma to the left hip.

The medical report states that the appellant sustained deep cut wound on the forehead.

- Blunt injury –head
- Blunt injury hip left side
- Pin and blood loss .

And that he had healed completely. The appellant's testimony in court was that:-

" I sustained injuries on head and leg".And in cross examination stated " I was injured on left leg".

This court finds contradictions between the injuries sustained as pleaded and as per the medical notes and P3 form. Whereas the treatment notes refer to cut wound left side of the forehead. The plaint presents a deep cut wound on the right forehead.

And whereas his pleadings and evidence in chief talks of the injury on the leg, the P3 form talks of the upper 3rd of left thigh.

Parties are bound by their pleadings, it is trite law; and the appellant had an opportunity throughout the trial process and upto the date of hearing to seek for an amendment to clarify whether it was the left or right side of the forehead that had an injury, and further to clarify whether he was injured on the upper left hips as per the P3 form or on an undisclosed leg as per his testimony in court, pleadings and the medical report.

In my view, the contradictions on the type of injuries which the appellant purportedly sustained during the encounter with the respondent's motor vehicle not having been thrashed out, what remains on record is the 1st respondent's evidence that the appellant had a small cut on the forehead as there is no evidence of a deep cut wound on the forehead.

Further, as that the appellant must indeed have sustained injuries after hitting his head on the car and falling on the pavement on loose stones hence the injury on his left hip.

Those injuries were soft tissues which had healed and cannot be compared to those sustained by the plaintiffs in the Jane Njoki Muraya, although no two cases can be identical.

On the other hand the injuries sustained by the plaintiff in Francis Murimi Kariuki vs Samuel Njoroge were comparable to those sustained by the appellant albeit that decision was made in 1987 many years ago. I would, therefore, doing the best I can, interfere with the trial magistrate discretion and set aside the award of shs 70,000/- general damages and award the appellant shs 120,000/- had he proved his case against the respondents on liability on a balance of probabilities .

In the end, I uphold the decision of the trial magistrate dismissing the appellant's suit against the respondents and dismiss this appeal to the extend that I have stated above regarding liability and allow a variation on quantum of damages.

I order that each party bears their own costs of this appeal.

Dated, signed and delivered in open court at Nairobi this13th July, 2015.

R.E. ABURILI

JUDGE