Case Number:	Civil Appeal 40 of 2016
Date Delivered:	18 Oct 2018
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Sankale ole Kantai, Fatuma sichale
Citation:	Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	HCCA NO. 44 OF 2005
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAKURU

CORAM: [NAMBUYE, SICHALE & KANTAI, (JJA)]

CIVIL APPEAL NO. 40 OF 2016

CHARLES KIPKOECH LETING.....APPELLANT

=VERSUS=

EXPRESS (K) LTD & ANOTHER.....RESPONDENT

(Being an appeal from the judgment/Decree of the Honourable

Justice M. Ang'awa, delivered at Kericho on 11th February, 2010

In

Kericho HCCA NO. 44 OF 2005)

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court, **M.A. Ang'awa, J,** (as she then was), dated the 11th day of February, 2011, allowing the respondent's appeal against the Judgment of the trial court in favour of the appellant in Kericho PMCC, No. 617 of 2002, dated 24th July, 2006.

The brief background to the appeal is that the appellant sued the respondents following a road traffic accident which occurred on 18th April, 2002 at Muhoroni junction on the Kericho/Kisumu road, involving the appellant and motor vehicle registration number **KAE 621 Y / ZB 888,** (the accident vehicle). The 1st respondent was sued as the registered owner of the accident vehicle, while the 2nd respondent was its authorized driver. The appellant attributed the accident to the 2nd respondents' negligent manner of driving for which the 1st respondent was vicariously liable. The particulars of negligence attributed to the 2nd respondent were particularized in the plaint. As a result of the said accident, the appellant sustained a degloving injury and compound fracture of the left tibia, in respect of which he claimed against the respondents jointly and severally, for general and special damages, costs of the suit and interest.

The respondents filed a defence dated the 12th day of November, 2002, admitting the description of the parties, but denied that the alleged accident was caused by the alleged or any negligence on the part of the respondents, their servants, or agents as particularized in the plaint and instead, contended that the said accident was caused or substantially contributed to by the appellant's negligence as particularized in the defence. They also pleaded the doctrine of "*volenti non fit injuria*", and on that account, prayed for the dismissal of the appellant's claim against them.

On the 22nd May, 2003, parties recorded consent on liability at the ratio of 20% as against the appellant, and 80% as against the respondents. Thereafter, the matter proceeded by way of assessment of damages, resulting in the Judgment of the Principal Magistrate **J.K. Ngeno**, dated the 31st, day of August, 2005, allowing general damages at **Kshs 600,000/=** plus costs and interest at court rates from the date of the judgment; special damages for treatment of **Kshs 164,680**/=, special damages of outstanding bill at Tenwek Hospital of **Kshs 124,885/=,** with an order that special damages to attract interest at court rates from the date of judgment.

The respondents filed Kericho **HCCA NO. 44 OF 2005**, against the Judgment of the trial Court, raising three (3) grounds of appeal,

basically complaining that, general damages awarded to the appellant were excessive; that the special damages of Kenya Shillings one hundred sixty four thousand, six hundred and eighty (Kshs **164,680/=)** were excessive; that they were not pleaded nor proved; and lastly, that the medical expenses of Kenya Shillings one hundred and twenty four thousand, eight hundred and eighty five (**124,885/=)** were never pleaded.

The learned Judge upon re-assessing and re-analyzing the record before her reversed the trial Magistrate's award on special damages for alleged want of pleading, while the item on general damages was disallowed for the mis-description of the location of the injury on the appellant's body.

Upon allowing the respondent's appeal, the appellant filed this appeal contending that the learned Judge erred by:

(i) overlooking the consent on liability which parties had recorded,

(ii) delivering an erroneous judgment on account of a minor mistake that was made by the trial Magistrate, which was not fatal to the suit,

(iii) interfering with the judgment award which was given to the appellant,

(iv) failing to enumerate the limbs to be dealt with while delivering the judgment as required by law.

The appeal was canvased by way of oral submissions, buttressed by case law cited by the parties. Learned Counsel **Mr. Gekong'a,** faulted the Judge for failing to appreciate that parties had recorded consent on liability before the trial court; that the location of the injuries sustained by the appellant as a result of the accident were not in dispute as these were well captured in the two medical reports tendered in evidence.

Relying on **Denshire Muteti Wambua –versus- Kenya Power & Lighting Company Limited [2013] eKLR;** and **Mwangi Kiunjuri versus Wangethi Mwangi & 2 others [2016]** eKLR, counsel faulted the Judge for disallowing the trial court's award on general damages on account of a mis-description of the location of the injury sustained by the appellant. In counsel's view, this was a minor error committed by the trial magistrate, and which should not have been visited against the appellant. Further that it was neither raised nor canvassed by the parties before the Judge.

Turning to quantum of damages, counsel cited **Victoria Venzeni versus A.A. Kawir Transporters and another [2009] eKLR,** wherein the Court in the year 2000 awarded Kshs **1,000,000/=** for a comminuted compound fracture of the left tibia, and fibula; and **Veronica Mwongeli Kilanzo versus Robert Karume [2003] eKLr,** where in the year 2013, the Court awarded Kenya Shillings five hundred thousand (**Kshs 500,000/=)** for a compound fracture of the right tibia and fibula. On the basis of the above awards, counsel urged us to sustain the award allowed by the trial Court of **Kshs 600,000/=** on general damages as in counsel's view, the same was not excessive in the circumstances of this appeal.

Opposing the appeal, learned counsel, **Miss Sitienei**, while conceding that liability had been agreed upon by consent of the parties and that neither party addressed the Judge on the issue of the location of the injuries on the appellant's body, nonetheless, urged us not to fault the Judge's exercise of her discretion in reversing the trial court's findings. In counsel's view, the Judge exercised her discretion judiciously which in counsel's view should not be interfered with as the Judge reviewed the record and gave reasons as to why she reversed the findings of the trial Court.

To buttress her submissions, counsel cited the case of **Abok Adere T/A A.J Adere & Associates versus John Patrick Machira T/A Machira & Co. Advocates, [2013] eKLR** on the role of a first appellate court, in support of her submissions that the first appellate Judge exercised her mandate judiciously as already submitted above. **Miriam Maghema Ali –versus- Nyambu t/a Sisera Store [1990] eKLR** for the observations on proof of special damages namely; that it is the duty of a claimant to prove damages claimed; **Dakianga Distributors (K) Ltd versus Kenya Seed Company Limited [2015] eKLR,** for the 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 alternatively, which is at variance with the averments in the pleadings must be disregarded.

This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See **Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007,** and **Stanley N.**

Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings *inter alia* that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of **Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511** where in, it was held *inter alia* that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties; the issues that fall for our determination are as raised in the supplementary grounds of appeal.

With regard to ground 1, we agree with the appellant's submission that issue of liability was settled by the respective parties when they recorded a consent on the 22nd day of May, 2003, apportioning liability as between the parties. We also agree with the appellant's submissions that the Judge was required in law in terms of order 42 Rules 25, 27 and 32 of the Civil Procedure Rules to confine the determination of the appeal before her within the confines of the three (3) grounds of appeal raised before her by the respondents.

As for ground two (2), we agree with the concurrent submissions of the respective parties and fault the Judge for introducing the issue of the location of the injuries on the appellant's body, which had not been raised before the Judge by the parties and then using it as an additional reason for interfering with the trial Magistrate's award on general damages.

With regard to ground three (3), the position in law as was stated by the Court in **Hahn versus Singh [1985] KLR 716,** is that special damages must not only be specifically claimed, but also strictly proved; that the degree of certainty and the particularity of proof required to establish a special claim depends on the circumstances and the nature of the acts themselves.

It is not disputed that the appellant pleaded for special damages in paragraph 7 of the plaint. He therefore satisfied the first limb of this principle. We also observe from the same paragraph that he gave particulars, with the initial figure indicated as **Kshs 2000/=,** which was subsequently crossed out in free hand and a figure of **21,176/=** substituted therewith. We also observe from the record that on 02/12/2004, counsel for the appellant applied informally to amend the figure for special damages to factor in medical expenses that had accrued as at that point in time, to which request, counsel for the respondent indicated that he had no instructions, where upon the court informally granted the appellant leave to file an amended plaint.

We have not traced any formal or informal amendment of this item on the record. The appellant however, tendered evidence with regard to the nature and extent of the treatment received for the injuries sustained in the accident and where these were provided. He also tendered receipts as proof of the expenses incurred under this item. These were tendered in evidence without any objection from the respondents. He was also cross-examined at length on that evidence. In the light of the above observations, we have no doubt that the figures arrived at by the trial magistrate were in accordance with the tabulations carried out by the said trial magistrate based on the receipts tendered in evidence by the appellant without any objection from the respondents.

In the result and for the reasoning we have given above, we find justification in faulting the Judge for interfering with the trial Court's award on the special damages claim as a whole. We are satisfied that on the record the appellant had satisfied both limbs of the principle that guide the exercise of the court's mandate when determining a special damages claim. The failure to reflect the proven figures on both items for the special damages claim both in the pleadings and on the record lay with counsel then on record for the appellant who failed to utilize the leave granted to the appellant to amend the plaint as directed on 02/12/2004; and also on the court for its failure to bring this to the notice of the parties and have it regularized especially in the circumstances herein where the receipts relied on were produced without objection from the respondent before the conclusion of the trial. We find in the circumstances of this appeal that disallowing the claim on these items simply for the failure of both learned counsel for the appellant and the court to realign the pleadings on special damages to be in tandem with the proven amount as per the evidence and exhibits tendered by the appellant in Court without any objection from the respondents would be tantamount to visiting an injustice on an innocent party. We therefore find sufficient justification to interfere with the Judge's exercise of discretion to discount both items under the special damages claim.

Turning to the award on general damages, we agree with the appellant's submissions that it was neither inordinately high nor low to warrant any interference. We therefore likewise, affirm the award on general damages as arrived at by the trial magistrate.

The upshot of the above assessment is that we allow the appeal; set aside the High Court judgment dated the 11th day of February, 2011, and restore the Judgment of the trial court dated the 31st day of August, 2005. The appellant will have costs on appeal and the two courts below.

Dated and delivered at Nakuru this 18th Day of October .2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR