



**Munywoki v Mwaniki (Civil Appeal E043 of 2022)
[2024] KEHC 17203 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E043 OF 2022
TM MATHEKA, J
AUGUST 20, 2024**

BETWEEN

SIMON KATIKU MUNYWOKI PLAINTIFF

AND

ERICK MUTEVU MWANIKI DEFENDANT

JUDGMENT

1. On 17/6/2020 the plaintiff/appellant filed Simon Katiku Munywoki a plaint suing the defendant/respondent Eric Mutevu Mwaniki for general and special damages.
2. His claim was that in the month of July, 2017, the plaintiff while going about his affairs at Muusini Market, the defendant attacked him, kicking him - and caused him injuries to wit injuries to the stomach/abdomen, spleen, small intestine, bowel & colon. As a result he had to seek medical care - suffering loss and damage - he paid Kshs. 1000 for the P3 form, medical expenses at Kshs. 500,000 and travelling expenses at Kshs. 22,300, he sought judgment against the defendant for these & general damage damages for pain and suffering.
3. In the plaint, he pleaded that the reported the matter at Kavumbu Police Station and was issued with OB 21/13/04/2019 - and that the family of the defendant pleaded with him - he withdrew the claim from the police and they entered into a written agreement whereby the defendant's parents would pay him Kshs. 300,000. That following their refusal to pay the money, he had filed this suit.
4. The plaint was accompanied by his statement and a bundle of documents - treatment notes, receipts etc.
5. The defendant filed defence on 19/10/2020 and denied the allegations, and averred that the plaintiff sustained injuries when he threw himself in the air trying to kick the bar owner with whom they had an altercation. That the defendant's parents did agree to pay the plaintiff Kshs. 300,000 paid him 200,000 leaving a balance of Kshs. 100,000. Attached to the defence is the defendant's statement.



6. The matter proceeded undefended on 17/3/2022. The plaintiff testified thus, “I am Simon Katiku Munywoki. I don’t work. I wish to adopt my statement as evidence in chief. I wish to produce my list of documents as exhibits - 1 - 43 respectively. I pray for compensation.”
7. In the judgment delivered on 14/7/2022 the learned trial magistrate found that the plaintiff’s claim had not been contested and found liability against the defendant at 100%.
8. On damages - the court found that upon considering the medical reports she found no evidence of any injuries caused by a physical attack - that “ despite proof that the plaintiff was battered by the defendant - there was no connection/nexus laid between the alleged battery and the diagnosis “ and proceeded to dismiss the suit.
9. The appellant was aggrieved and filed appeal on 22/3/2023 on the grounds that; - that the learned trial magistrate was in error by finding that there was no nexus between the alleged battery and the illness the appellant was diagnosed with; in failing to award damages despite finding the defendant 100% liable; by ignoring the fact that the respondent had previously admitted battering the appellant. The appellant sought from court - that the appeal be allowed and that an order be made that the appellant is entitled to compensation with general and special damages with costs to him.
10. The appellant’s counsel filed submissions firstly reminding this court of its duty as 1st appellate court as held in *Selle & Anor vs Associated M/Boat Co. Ltd & others* (1968) EA 123 the duty to re-assess, by a way of retrial, and draw its own conclusion aware of the fact that it neither heard or saw the witnesses testify.
11. It was submitted that the learned trial court erred in determining that without a medical legal report she could not award damages. The appellant cited *Esther Chepkemei Ngecher vs John Kung’u & Charles Muthoka* [2022] eKLR for the proposition that the absence of a medical legal report does not oust the fact that the appellant sustained injuries in the said accident.
12. Counsel submitted that with respect to general damages the appellant was entitled to Kshs. 2,000,000 and cited *Wendy Martin vs IL Ngwesi Co. Ltd & 2 others* [2008] eKLR - to the effect that there is;

“ a non pecuniary damage that concerns loss of physical amenity, pain, shock & suffering. This court is required to take into account any pain and suffering which can be “attributed the injury and to any consequential surgical operation. It is an award that must cover past and future pain...”
13. Counsel also relied on *Alex Muthinji Njeke & Anor vs Attorney General* [2017]eKLR - where the plaintiff sustained multiple small intestine lacerations, perforated traverse colon, contused ormentum, small liver laceration with resultant faecal soiling and hemoperitoneum and the court awarded Kshs. 3,500,000.
14. I have carefully considered the submissions, the record, the grounds of appeal and two issues arise for determination whether the plaintiff established liability on part of the defendant and if so how much general damages is awardable.
15. On liability-in the subordinate court the plaintiff submitted that plaintiff had pursuant to Section 107 of the *Evidence Act*, the plaintiff had proved that the defendant was liable for his injuries that he had presented his case - and the defendant had not controverted that case and henceon the strength of *CMC Aviation Co. Ltd vs Kenya Airways Ltd Cruisair Ltd* [1978] eKLR; *Trust Bank Limited vs Paramount Universal Bank Limited & 2 others (Milimani)* HCCS No. 1243/2001; *Karuru Munyororo vs Joseph Ndumia Murage & Anor Nyeri HCC 95/1988* all for the proposition that pleadings are not evidence -



and the case cannot be determined from the pleadings only – pleadings must be supported by evidence; and failure by the defendant to adduce any evidence leaves the plaintiff's evidence uncontroverted and therefore unchallenged - it becomes evidence that a court of law should be able to act upon.

So, what is the plaintiff's evidence?

17. The appellant adopted his statement as evidence - that statement is to the effect that in July, 2017 he walked into bar in the local market to buy cigarettes. He paid with Kshs. 1000 note - the bar owner did not have enough change - gave him Kshs. 750 and asked him to wait for his Kshs. 200. He sat on a chair to wait - but the chair broke. The bar owner pushed him out of the bar - an altercation ensued - and she threw him out of the bar. That it was while he was outside the bar that a person he did not know came from the bar and without a word, kicked him in the stomach. He felt a lot of pain. The following day he went to hospital – Makueni County Referral Hospital then was referred to Makindu Hospital for an operation, there he was informed that one of his kidneys was damaged and required to be removed. He continued with treatment in various hospitals until August, 2019 - and by 17/6/2020 he felt the need for constant checkup. That subsequent to the assault he reported to the police station at Kavumbu vide OB No. 21/12/04/2019. That the family of the assailant pleaded with him to withdraw the complaint and they would pay Kshs. 300,000 and in default he would be at liberty to pursue the case. He said the family had paid him Kshs. 200,000 and refused to pay the balance of Kshs. 100,000. That though they agreed at Kshs. 300,000 he had incurred Kshs. 500,000 and now he sought general damage and special damage for the injuries he sustained.
18. I have perused the alleged admission - it speaks about OB 20/25/03/2019 about “withdrawal statement” between the plaintiff and the defendant on 13/4/2019. Another OB ref No. 21/13/04/2019 is also mentioned.
19. There is an agreement dated 13th April - which states that

“the parents of Eric Mutevu Mwaniki have agreed to refund the medical expenses to the tune of Kshs. 300,000 ...failure to pay the assailant ... shall be prosecuted.”
20. First - I find no evidence of any report of an assault at Kavumbu Police Station in July, 2017. While perusing the document - I came across a note dated 25/3/2019 stating that on that day an unnamed person writing from the office of the Assistant Chief Muusini Sublocation had written stating that Simon Katiku Munywoki had reported to the office that he had been assaulted by a person known to him on 5/7/2017.
21. A look at the report proves that it was being made 2 years after the alleged assault. The alleged assailant is not even named when the report is made to the Assistant Chief - yet this time the appellant knows who assaulted him and if he is to be believed - he is about to enter into an agreement with the parent of this person for compensation.
22. The appellant's statement says he was assaulted in July, 2017 no date is given in the plaint or his statement, a date is only found in this note allegedly by the assistant chief. There is no OB for July, 2017. There is an OB for April, 2019 clearly the agreement being relied on and the alleged assault in 2017 are not being connected here.
23. True, the parents of the defendant/respondent entered into an agreement in 2019 for refund of medical expenses, true - there is an agreement to withdraw an alleged complaint from the police but these are not connected in any way with the alleged assault in 2017 whatever medical expenses are being refunded to the appellant - I am at pains to connect those documents with the assault alleged to have happened in 2017.



24. In addition, I have perused the medical documents - treatment charts, etc - they are for 2018, 2019. One report says (1/4/19) that the appellant had fistula/local mesenteritis; Another note says (11/3/19) Septic incisional wound; Also another says he had perforated gastric ulcer; Another of 12/3/19 says that "pancreas, spleen, both kidneys are normal"; The diagnosis in June, 2018 was perforated gastric ulcer.
25. All the above is not explained in evidence or in the statement. It was upon the plaintiff /appellant to establish through evidence that sometime in July, 2017 the defendant/respondent assaulted him and caused him the injuries he was claiming - and that as a result of the same - he had suffered loss and damage.
26. What I find as a fact from the record is that there was no nexus laid by the plaintiff between the alleged assault on unknown date in July 2017 and the alleged ailment he went through from 2018, 2019.
27. Even if the defendant was to admit the alleged assault in 2017 - the plaintiff would still have to place evidence before court to connect the alleged assault with the injuries set out in the plaint. It appears that the plaintiff had an underlying condition - that was unrelated to the alleged assault - and for which the parents of the respondent - agreed to pay to avoid the prosecution of their son as per the agreement.
28. In my view - the plaintiff did not establish that any assault occurred against him in July, 2017 as there is nothing in the documents placed before court to support his statement that he went to the hospital or the police in 2017- hence the trial court was in error in finding that the respondent was liable for the alleged injuries by the appellant. Just like in *Charter House Bank Limited v Frank N. Kamau* [2011] eKLR - Civil Case 263 of 2008.

This letter in my understanding does not constitute an admission of liability by any stretch of imagination. An admission is clear, plain and without any ambiguity. In the upshot I find the evidence adduced by PW1 and the documentary evidence produced by the plaintiff in support of their claim are incomplete. The plaintiff has failed to prove on a balance or probability that it lent the sum claimed to the defendant. Accordingly, the plaintiff's suit fails with costs to the defendant (emphasis mine).
29. On quantum - I have to agree with the learned trial magistrate that the appellant did not establish any nexus between his allegations and the alleged assault to warrant any assessment of damages.
30. In the circumstances I find that the appeal has no merit. The appeal is dismissed and the order of the subordinate court is upheld.

DATED SIGNED AND DELIVERED VIS CTC ON 20/8/2024

MUMBUA T. MATHEKA

JUDGE

