Magiri v Kamau (Civil Appeal 418 of 2022)
[2024] KEHC 11638 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 418 OF 2022

REA OUGO, J

SEPTEMBER 27, 2024

BETWEEN

DENNIS MUTWIRI MAGIRI .... APPELLANT

AND

JOSEPH KAMAU .... RESPONDENT

(Being an appeal from the Chief Magistrate's Court at Milimani Civil Suit No. E763 of 2021 against the judgment and decree delivered on 27/5/2022 by Hon. Makau (PM))

JUDGMENT

1. The respondent Joseph Kamau while walking along Kimathi Street was hit by the appellant who was the owner of motor vehicle registration no. 808N. As a result, he sustained a compound (open) fracture-left medial malleolus (lower portion tibia) and swollen, painful, tender left ankle. He sought general and special damages, future medical expenses, costs and interest. Liability was settled in the ratio of 80:20 by consent of the parties.
2. The trial magistrate in his judgment made the following award subject to the agreed liability:
    1. General damages Kshs 1,000,000/-
    2. Special damages Kshs 3,550/-
    3. Future medical cost Kshs 100,000/-
    4. Costs of the suit and interest on 1, 2 and 3.
3. The appellant now appeals against the finding of damages on the following grounds:
    1. That the learned trial magistrate erred in law and in fact by awarding the respondent the sum of Kshs 1,000,000/- on general damages in total disregard of the applicant's submissions and

existing court awards in similar cases. The award above was excessively and inordinately high that it constituted a wholly erroneous estimate of the damages.

2. That the learned trial magistrate erred in law and in fact in making an award of Kshs 100,000 on future medical expenses. In making such a judgment the learned trial magistrate erred in law and in fact and had acted on a wrong principle of law in that the basis of such judgment was said to be a Dr. G.K Mwaura Medical report which report was not filed in court with the plaint or thereafter and not served.

3. That the learned trial magistrate erred in law and in fact in awarding the sum of Kshs 100,000/- on future medical expenses when such a claim had not been proved on a balance of probability to warrant an award.

4. That the entire judgment was against the law and the weight of the evidence on record and was therefore for inference as it was clearly wrong.

4. The appellant in his submission argues that the authorities cited by the respondent at the subordinate court were of plaintiffs who sustained permanent disability of 20% and above. The respondent failed to prove permanent incapacity as the report by Dr. G.K Mwaura was never filed. Therefore, the judgment awarding Kshs 1,000,000/- as general damages was excessive and manifestly high. They cited the case of David Muendo v Scholastika Muluki Ndungu (2018) eKLR where an award of Kshs 130,000/- was made after the plaintiff sustained injuries to the head, neck, chest, abdomen and upper-lower limps. In *Francis Muiruri Mwangi v John Ngungi* [2015] eKLR, the plaintiff sustained soft tissue injuries and dislocation of the right elbow joint and was awarded Kshs 120,000/-. In *Albert Sambai & Another v Susan Nsimiyu Maunda* (2019) eKLR the plaintiff sustained soft tissue injuries and a fracture of the right femur and was awarded Kshs 500,000/- as general damages. Although the appellant cited the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR it pointed out that the injuries sustained by the plaintiff therein were much more severe compared to those sustained by the respondent. The appellant submits that in *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* case (*supra*), the court awarded Kshs 400,000/- for o for similar injuries. The appellant submits that an award of Kshs 400,000/- should compensate the respondent appropriately.

5. On future medical expenses, the appellant submits that since no medical report was filed and served the award of Kshs 100,000/- should be set aside as it was not supported by evidence.

6. The respondent opposed the appeal and argued that documents were produced following the consent of the parties. The respondent conceded that documents were not annexed to the Record of Appeal but from the list of documents dated 22/1/2021, the medical report was listed as Exhibit No 4. The production of the document was not contested. The respondent urges the court to find that the award of the trial magistrate on general damages was reasonable.

7. The respondent submits that since the doctor had recommended an award of Kshs 100,000/- for the removal of implants, the same ought to be awarded since the same was based on the doctor's recommendations.

Analysis and Determination

8. The only issue raised in the appeal is whether the damages were excessive. In *Kemfro Africa Ltd And Another v Lubia And Another* (1982-88) KLR, the Court of Appeal held as follows:

> " In deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge, an appellate court must be satisfied that the judge in assessing the damages, took into

account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. In assessment of damages, the general method of approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

9. The injuries sustained by the respondent have been challenged by the appellant who submits that the medical report was not produced. In *Kenneth Nyaga Mwige v Austin Kiguta and 2 others* [2015] eKLR had this to say on the production of documents.

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.
>
> Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.
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> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record." [Emphasis added]

10. In this case it is not in dispute that the respondent filed its list of documents dated 22/1/2021, that listed the medical report by Dr. G.K Mwaura as one of the documents that intended to rely on. However, the document was not filed and therefore could not be produced in evidence as an exhibit by the respondent; it did not become part of the judicial record of the case nor could it constitute the respondent's evidence. The respondent could not use their submissions as evidence to prove that he had suffered a 5% disability. Similarly, since the medical report was not filed with the lower court and therefore not available to be produced as evidence, the claim of future medical expenses was unsupported by evidence. The Court of Appeal in *Mbaka Nguru & Another v James George Rakwaro* NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR observed as follows:

> " We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head ......"

11. In this case although the respondent in his plaint sought future medical expenses of Kshs 100,000/-. However, there was no proof of the same since the respondent failed to produce the medical report.

12. What were the injuries proved by the respondent? The plaintiff did not testify at the lower court as to the injuries sustained. Although the respondent's list of documents dated 22/1/2021 listed the copy of the P3Form, discharge summary from Kenyatta National Hospital and Report by Dr G.K. Mwaura, all these documents were not filed. The injuries sustained by the respondent were not proved. The only document filed by the respondent was a demand letter.

13. In conclusion, the award by the trial magistrate is set aside and the respondent's claim is dismissed in its entirety as the respondent failed to prove that he sustained the injuries listed on his plaint. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA TEAMS THIS 27TH DAY OF SEPTEMBER 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Martin -For the Appellant

Respondent - Absent

Wilkister -C/A