



REPUBLIC OF KENYA



KENYA LAW
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**Migiro v Bitega & 2 others (Civil Appeal 14 of 2018)
[2023] KEHC 560 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL 14 OF 2018
F GIKONYO, J
JANUARY 26, 2023**

BETWEEN

EVANS BITANGE MIGIRO APPELLANT

AND

RICHARD BITEGA 1ST RESPONDENT

ESTHER WANJIRU 2ND RESPONDENT

LUCKY HOUSE INTERNATIONAL LTD 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. T. Sitati
(R.M) delivered on 20/08/2013 in Narok CMCC No. 173 of 2011)*

JUDGMENT

1. In the primary suit, the trial court entered judgment in default against the respondents for failure to enter appearance. The case proceeded on formal proof. The appellant adopted his witness statement and list of documents without calling the makers thereof. The documents were produced as P Exh 1-7. The appellant's case was closed and the appellant filed written submissions on quantum of damages with authorities.
2. The trial court delivered judgment in favour of the appellant against the 1st and 3rd respondents but dismissing the suit against the 2nd respondent for want of prove of beneficial ownership.
3. On general damages; the trial court held that omission to call the makers of the medical report document was fatal to the case. The court awarded a nominal sum of Kshs. 1,000/= in general damages and Kshs. 75,305/= in special damages. The trial court declined to award Kshs. 2,000/= for the medical report fee because the doctor was not called to court as a witness. The trial court also awarded interest at court rates from the date of filing of the suit (for the special damages) and from the date of judgment



(for nominal damages) till payment in full. The findings of the trial court have precipitated the appeal herein.

4. The appellant in his memorandum of appeal date 12th September 2013 raised 8 grounds as follows;
 - i. The honourable magistrate erred in law and in fact in failing to consider the documents in support of the claim duly produced by the plaintiff hence arriving at erroneous finding,
 - ii. The honourable magistrate erred in law and in fact in holding that the plaintiff must call the doctor in a formal proof hearing while the medical report was duly produced.
 - iii. The honourable magistrate erred in law and fact in awarding nominal damages of Kshs. 1,000/= which award has no basis in law as it was not prayed for.
 - iv. The honourable magistrate erred in law and fact in awarding inordinately low damages of Kshs. 1,000/= under the heading general damages.
 - v. The honourable magistrate erred in law and fact in failing to appreciate the provisions of sections 1A and 1B of the *Civil Procedure Act* cap 21 laws of Kenya on the overriding objective and duty of the court hence arriving at an erroneous judgment.
 - vi. The honourable magistrate erred in law and fact in dismissing the suit against the 2nd defendant while the court had already entered an interlocutory judgement against all defendants.
 - vii. The honourable magistrate erred in law and fact in not allowing the plaintiff to present his case at the hearing instead he insisted that the plaintiff adopts the filed statement and the list of documents.
 - viii. The honourable magistrate erred in law and fact in failing and / or refusal to consider the written submissions by the plaintiff and the authorities in support of the submissions

Directions of the court.

5. The appeal was canvassed by way of written submissions. The appellant has filed written submissions. The respondents have not filed.

Appellant's submissions

6. The appellant submitted that non-production of the medical report by the maker was not fatal to the plaintiff's claim but was in line with practice directions and provisions of sections 1A and 1B of the CPA on the overriding objectives of the court and expeditious disposal of suits.
7. The appellant submitted that the plaintiff suffered damages as per the list of injuries stated in the medical report and treatment summaries from Tenwek Hospital and Kenyatta national hospital (P Exh 1, 2, and 3) the injuries enumerated therein could clearly confirm that he suffered actual injury. The stated injuries cannot be said to be nominal as alluded to but were major injuries that caused permanent incapacity which may lead to epilepsy in the future and dependency on anti-convulsion drugs. The award of Kshs. 1,000/= under nominal damages and for general damages was misplaced



and without basis. The award was so inordinately low. He urged this court to interfere reassess and grant an appropriate figure in general damages.

8. The appellant proposed a sum of Kshs. 1,800,000 under general damages.
9. The appellant has relied on the following authorities;
 - i. [*Ali Ahmed Naji Vs Lutheran World Federation*](#) Civil Appeal No. 18 of 2003.
 - ii. [*Gitobu Imanyara & 2 others Vs Attorney General*](#) [2016] eKLR.
 - iii. *Jane Chelagat Bor Vs Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47.
 - iv. Nakuru HCCC No. 344 of 2010 [*James Thiongo Githiri Vs Nduati Njuguna Ngugi*](#) M.J. Anyara Emukule- 4/5/2012
 - v. HCCC. 1977 of 2000 [*Paul Mesback Onyango Vs Dismas O. Nyanya Angawa*](#) J- 25/11/2003

Analysis And Determination

Duty of court

10. Under Section 78(2) of the [*Civil Procedure Act*](#), the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.
11. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hear the witnesses firsthand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

12. The issues for determination arising from the appeal relate to: Liability; and Quantum of Damages

Liability

13. The appellant's case was that he was a fare-paying passenger in motor vehicle registration number KAX 439Y driven by the 1st respondent and legally owned by the 3rd respondent but beneficially owned by the 2nd respondent. He alleged that the 1st respondent so negligently and/ or recklessly drove, managed, and /or controlled the said motor vehicle that it lost control and rolled severally.
14. According to the police abstract dated 5/4/2011, the vehicle suffered a tyre-burst. The copy of the motor vehicle record shows that the registered owner was the 3rd defendant and the national industrial credit bank limited. No evidence was tendered to prove beneficial ownership by the 2nd respondent.
15. On the basis of evidence adduced, the 2nd respondent is not the beneficial owner of the motor vehicle in question. Accordingly, the trial court was right in finding that the 2nd respondent was wrongly joined in this suit, and consequently dismissing the suit against the 2nd respondent.
16. The accident herein was self-involving. I therefore find that the 1st and 3rd respondents are 100% liable.



Quantum damages

17. Assessment of damages is at the discretion of the trial court. Therefore, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be a wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another* as follows: -

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

18. The trial magistrate awarded Kshs. 1,000/=as nominal damages; the appellant regards the award as inordinately low.

19. The trial court declined to award general damages as prayed on the basis that Dr. AK Mwaura who had been lined up as a witness was not called to attend court to testify. The trial court stated that it could therefore not ascertain the degree of injury suffered, medical procedures involved in his treatment and the extent of disability suffered by the appellant. The trial magistrate contended that the omission was fatal to the appellant’s case.

20. Section 35(1) of the *Evidence Act*, provides as follows:

In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact.

21. In this case, the trial court noted that the appellant adopted his written statement and proceeded to produce the documents in the list of documents as follows; P Exh 1- medical report by Dr. Mwaura, P Exh 2 – treatment notes from Tenwek hospital, P Exh3- treatment notes from Kenyatta National Hospital.

22. In light thereof, the evidence before the trial court was capable of proving the fact of the injuries sustained by the Appellant. Accordingly, the trial court erred in finding that failure to call an expert witness (Dr. Mwaura) was fatal to the case.

23. What were the injuries sustained by the appellant?

24. The appellant pleaded that he sustained bodily injuries, loss, and damage. He complained of the following injuries;

- i. Cerebral concussion resulting into unconsciousness for several days.
- ii. Fracture of the rib on the left side.
- iii. Hemothorax (bleeding of the chest)
- iv. Cut wound to the occipital region.
- v. Cut wound to the lower abdomen.
- vi. Cut wound to the left chest.



25. PW1 testified that he was admitted for 3 days at Tenwek hospital and 15 days at Kenyatta National Hospital. He was in a coma for about 10 days. He stated that physically he has healed but has memory lapses from the head concussion. He also has chest injuries.
26. The appellant cited the case of Nakuru HCCC No. 344 of 2010 *James Thiongo Githiri Vs Nduati Njuguna Ngugi*; in this case the plaintiff sustained multiple fracture of all limbs, open reduction and internal fixation of the unilateral fractures of the humerus and femur was done. The plaintiff was awarded Kshs. 1,800,000/=
27. The appellant also cited the case of HCCC No. 1977 of 2000 Paul Meshack Onyango Vs Dismas O. Nyanya . The plaintiff in this case sustained head injury with right side extra Dural hematoma subdural hygoma, bilateral temporal mandible joint dislocation, cut wound right forehead and shock. The plaintiff was awarded Kshs. 1,500,000/=
28. The authorities cited by the appellant; one has multiple fractures and the other has injuries which are completely out of the bracket of the injuries sustained herein. They are not suitable or comparable to injuries in this case.
29. Compensation for, is determined by the nature and extent of injuries. And, comparable awards made in the past acts as a guide only (see Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR).
30. In the case of *Morris Miriti v Nabashon Muriuki & another* [2018] eKLR the plaintiff sustained the following injuries: tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula. The court affirmed an award of Kshs 300,000/- for general damages.
31. Taking everything into account the injuries sustained by the appellant, I find that the award by the trial magistrate was inordinately low and a wholly erroneous estimate of damages in this case.
32. As the appellant also suffered a concussion for 10 days, I am satisfied that an award of Kshs. 300,000/= is reasonable and fair compensation.
33. As a consequence, I set aside the award for pain and suffering by the trial court, and substitute it for an award for Kshs. 300,000/=.

Special damages

34. The appellant in his plaint particularized special damages as;
 - i. Medical report Kshs. 2,000
 - ii. Police abstract Kshs. 200
 - iii. Medical expenses Kshs. 74,805.
35. The appellant produced original receipts for Kshs. 75, 305. The same was awarded by the trial court.
36. The trial court declined to award the fee for medical report of Kshs. 2,000 on the ground that the same was not proved and could not be fully claimed when the medical report was not properly produced to court.
37. A perusal of the trial court record leads to an observation that the document listed in the list of documents at no. 6 – medical report receipt was misplaced.



38. I find that the medical report receipt was not produced. accordingly, the trial court was right in rejecting the claim of Kshs. 2,000 fees for the medical report.

Conclusion and orders.

39. In the upshot, I enter judgment for the appellant against the 1st and 3rd respondents as follows: -

- i. General damages..... Kshs. 300,000/=.
- ii. Special damages..... Kshs. 75,305
- iii. Costs and interest on the award
- iv. The appellants shall have the cost of this appeal.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 26TH DAY OF JANUARY, 2023.

F. GIKONYO M.

JUDGE

