



REPUBLIC OF KENYA



KENYA LAW
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**Adungo v Dahiya (Civil Appeal E002 of 2022)
[2023] KEHC 192 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E002 OF 2022**

RK LIMO, J

JANUARY 24, 2023

BETWEEN

MILTON ADUNGO APPELLANT

AND

HALIMA MOHAMED DAHIYA RESPONDENT

*(Being an Appeal from the Judgement/decree of the Honourable Israel Ruhu
(RM) delivered on 16th December, 2021 in Mwingi CMCC No. 84 of 2018)*

JUDGMENT

1. This appeal arose from the Judgement of Hon. I.G. Ruhu delivered on December 16, 2021 vide Mwingi, CMCC No. 84 of 2018. In that case the appellant had sued the Respondent owing to a traffic road accident that occurred on January 2, 2018 along Mwingi-Thika Road at Kinginga involving motor vehicle registration no. KBT 043Z. The appellant claimed he was a passenger in the said motor vehicle when it was involved in the said accident and blamed the Respondent and /or his driver in the manner in which he drove the said motor vehicle alleging negligence.
2. In response, the Respondent filed Defence dated July 30, 2018 where she denied that any accident occurred and that if there was any such accident, the occurrence was solely caused and/or substantially contributed to by the Appellant's own negligence. The Respondent further denied that the Appellant suffered any injuries.
3. At the trial, the Appellant presented 2 witnesses while the Respondent called one witness.
4. In summary, the appellant testified at the trial and stated that he was travelling aboard motor vehicle Registration No. KBT 043Z (hereinafter to be referred to as the subject motor vehicle for ease of reference) when the said vehicle was involved in an accident. He testified at the trial court that he sustained injuries to his neck, chest, right hand finger, knee and hip joint. He stated that he was treated at Mwingi Level 4 Hospital and discharged the same day and that he continued with treatment in Wajir



in respect to the neck injuries sustained. He tendered the following documents which he relied upon in his case namely: -

- a. A copy of his Identity Card P. Exh. 1.
 - b. A Police Abstract P Ex 4.
 - c. A copy of search of the subject motorvehicle. P Ex 5(a) and accompanying receipt –P Ex 5(b)
 - d. Demand Letter P Ex 6.
 - e. A medical report P Ex 7 (a) and Receipt for Kshs. 5,000 P Ex 7(b).
5. The appellant called one witness one Dorcas Ndanu Kaluma (PW2) who stated that she was a Clinical Officer working at Mwingi Level 4 Hospital. According to her, the appellant went to the said hospital on January 21, 2018 where she attended to him.
 6. She tendered a copy of treatment chit and a copy of P3 Form which she acknowledged signing as P Ex 2 and P Ex 3 respectively. She conceded that the registration number of the patient did not appear on the treatment notes and that her name was missing but stated that it was not unusual because many a time patient would go with the treatment notes. She however, confirmed that the patient was in the Road Traffic Register which she said she checked before she issued the P3 Form.
 7. The Respondent on the other hand, presented one witness one David Mutisya (DW1) who told the trial court the he was testifying on behalf of his colleague one Joseph Mwavu who reportedly was deceased. He testified that the appellant was not treated at Mwingi Level 4 Hospital as per the Records from the Hospital and that the treatment note was not serialized. According to him the treatment notes tendered as evidence by PW2 were forgery, though he conceded that PW2 was known to him as she worked at the same facility.
 8. In regard to general damages, the court held that a shadow of doubt was cast with regards to the authenticity of medical documents from Mwingi Level IV Hospital produced in support of the Appellant's case on the injuries sustained. The Trial Court proceeded to reject the Appellant's claim for general damages but held that it would have awarded Kshs 150,000/- had the claim been proven and also awarded Kshs. 5,655 in special damages.
 9. The Appellant felt aggrieved by the above decision and filed this appeal raising the following grounds namely: -
 - i. The Learned Magistrate erred in fact and in law and in ignoring the Appellant's evidence on quantum and more specifically that the Appellant sustained injuries as a result of the accident.
 - ii. The Learned Magistrate erred in fact and in law in failing to consider the Appellant's evidence on the injuries sustained.
 - iii. The Learned Magistrate erred in fact by ignoring the Appellant's evidence disputing the Respondent's evidence on fraud.
 - iv. The Learned Magistrate erred in fact and in law ignoring the cross examination of DW1 on the aspect of fraud yet prove of fraud behoves a higher degree of proof.
 - v. The Learned Magistrate erred in fact and in law in failing to give reasons in his judgment as to why he believed the evidence of DW1 as opposed to that of PW2 who was the maker of the alleged fraudulent treatment notes.



- vi. The Learned Magistrate erred in fact and in law in disregarding the fact that the Health Management and Information System Register where the Appellant's name was said to be missing was not produced as an exhibit for the court to decipher the said allegation.
 - vii. The Learned Magistrate erred in fact and law by holding that the Appellant herein did not prove his case on a balance of probabilities as regards to the injuries sustained.
 - viii. That the Learned Magistrate's decision was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - ix. The Learned Magistrate erred in fact and in law in failing to make an award in general damages as is required in law had the Appellant's case succeeded.
 - x. The Learned Magistrate disregarded the Appellant's submissions and judicial authorities on both liability and quantum resulting to a miscarriage of justice to the Appellant.
10. In his submissions dated June 17, 2022 and filed on June 20, 2022, the Appellant faults the trial court's entire decision and he asks this court to reconsider and reevaluate the evidence on record and draw its own conclusion.
 11. The Appellant submits that the trial court disallowed the award for general damages without any basis and that the court adopted a wrong principle in agreeing with the Respondent's evidence with regards to her forgery allegation. The Respondent submits that while DW1 failed to produce the register that was used to determine that the Appellant was not treated at the facility, the Appellant produced treatment notes from the facility as well as the author of said treatment notes. He submits that the trial court believed the evidence tendered by DW1 over the evidence of PW2 without reasons.
 12. He cited the case of *Mary Njeri Murigi v Peter Macharia & Anor* (2016) eKLR where the court made reference to the case of *Autar Singh & Anor versus Raju Govindji* HCC 548 of 1990 where the court found that failure to call evidence renders a party's pleadings as mere statements.
 13. The Appellant also faults the trial court's decision submitting that the Respondent never raised the issue of fraud in her pleadings. He has cited the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Anor* (2000) eKLR where it was held that an allegation of fraud needed to be specifically pleaded on the face of pleadings.
 14. On general damages, the Appellant submits that an award of Kshs. 500,000/- would be fair. He relies on the case of *Joseph Mutua Nthia v Fredrick Moses M. Katuva* (2019) where the court awarded general damages at Kshs 400,000/- for the following injuries, two lost teeth, injuries to the face, blunt chest injury and blunt back injury.
 15. The Respondent has opposed this appeal through written submissions dated October 11, 2022 through Counsel.
 16. The Respondent has faulted the Appellant for presenting a witness named Ann Munyoki whom she says was not a witness. That contention however, is misleading because the record of proceedings from the Lower Court do not support the contention. There was no such witness called by the Appellant.
 17. The Respondent also faults the Appellant for failing to call police officer to testify on the contents of the abstract. Counsel also faults PW2's testimony submitting that the witness failed to produce the Traffic Road Accident Register to prove that the Appellant was treated at Mwingi Level 4 hospital.
 18. Counsel submits that the Appellant failed to prove how the accident occurred, the person who was to blame and the injuries that he sustained.



19. Counsel further submits that in the event that the court was to award general damages, an award of Kshs 100,000 would be sufficient and has relied on the following cases;
- a. *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others* (2019) eKLR where the court awarded the plaintiffs sums between Kshs. 90,000/- and Kshs. 100,000/- as general damages for soft tissue injuries
 - b. *Eva Karemi & 5 others v Koskei Kieng & another* (2020) eKLR where the court awarded awards ranging from Kshs 40,000/- to Kshs 70,000/- for soft tissue injuries.
20. The Respondent in a twist has asked this court to set aside the judgement from the Lower Court and reassess quantum based on their submissions.
21. This court has considered this appeal and the response made. The case at the trial and the finding of the trial court is interesting for a number of reasons which I will highlight shortly.
25. This being a first appeal, the duty of the first appellate court was well stated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court of Appeal stated: -
- “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has 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.”
22. That mandate was also well restated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where the Court of Appeal held as follows: -
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
23. The trial court on one hand found that the Appellant had proved the question of liability and apportioned 100% liability on the part of the Respondent. In other words, the trial court in its judgement found that the Respondent was 100% to blame for the accident in which the Appellant was making a claim owing to injuries he sustained. The trial court further found that the Appellant was a passenger in the subject motor vehicle and that the driver owed him and other passengers a duty of care.
24. However, on the other hand, the trial court found that the Appellant had not proved the injuries sustained because according to him, a shadow of doubt was cast on the authenticity of the medical documents produced by the Appellant and said to be issued at Mwingi Level IV Hospital. The trial



court found that the Respondent's Witness had pointed out several red flags on the treatment chit which persuaded it to conclude that it was not genuine. That finding in my view was erroneous because of the following reasons: -

- a. If the trial court made a finding that the medical documents were fake, then how could it at the same time find that the Respondent was liable for the injuries sustained. There was no basis for apportioning liability at 100% against the Respondent if the trial court's finding was to the effect that the Appellant had not proved that he suffered injuries in the accident.
- b. Secondly, the trial court did not specify which medical documents tendered were not genuine. The Appellant tendered the following medical documents;
 - a) Medical Report from Mituki Consultant Clinic dated 18.05.2018 P Ex. 7(a).
 - (b) Treatment notes P Ex 2 &
 - (c) P3 Form P Ex 3.

The trial court did not make a specific finding on each and every medical documents stated above and in the absence of that, this court finds that the finding by the trial court in regard to medical documents tendered was a bit cloudy and unspecific. It was certainly erroneous to hold that all the medical evidence tendered was unreliable because they met the threshold.

25. The trial court's direction could have been informed by the evidence of DW1 who termed the treatment notes (P Ex 2) a forgery. While the trial court could have, had the basis to cast doubts about the authenticity of the Medical Notes (P Ex 2) owing to the evidence of DW1, the same cannot be justified in respect to the other medical documents referred to above. Furthermore, the Clinical Officer (PW2) Dorcas Ndanu Kaluma, testified and confirmed being the author of the treatment notes. She stated that she signed the treatment chit and that in itself shows that the conclusion made by DW1 and the trial court was harsh to the extent that they termed a treatment chit a forgery when the author appeared in court and confirmed authoring it.
26. This court also notes from the record that the Respondent never pleaded in his defence that the medical documents or some of the medical documents were a forgery contrary to the provisions of Order 2 Rule 4 of the Civil Procedure Rule.
27. The record shows that the Respondent made attempts vide her Notice of Motion dated March 20, 2019 to amend her defence with a view to pleading the particulars of fraud as stipulated in the above cited Rule but upon being granted leave by consent to amend her defence on May 16, 2019, she never filed and serve her amended defence which technically meant that the only defence properly filed on record was her defence dated July 30, 2018.
28. In that statement of defence, the Respondent never pleaded fraud in regard to Medical documents or any other documents filed by the Appellant.
29. In the absence of a proper defence filed alleging fraud and giving particulars of the same, it was a departure and belated by the Respondent to bring in new allegations and ambushed the adverse party



30. It is trite that a party alleging for and on the opposite party, must prove the same and the standard of proof is higher than is usual in civil matters. That position was adopted in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR where the Court of Appeal held as follows;

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that;

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

31. The court then proceeded as follows;

‘t is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts

32. The evidence by DW1 that the treatment chit (P Exh 2) was not serialized and therefore, not genuine in my opinion was not sufficient evidence of fraud because the (Clinical Officer PW2) explained that it was not out of the ordinary for some patients to walk home after treatment with their treatment notes which would lead to the treatment chits not being serialized.

33. The Clinical Officer also stated that she checked at the Traffic Accident Register before issuing the P3 Form. The P3 Form and the Police Abstract were not found wanting by the trial court in my way. I have of course, noted that, the Appellant never did himself any favours because he did not tender original documents (treatment chit and P3 Form) but that notwithstanding, I find that the trial court had no sufficient basis to find that the documents were not genuine. The Respondent too never raised any issue on the copies being tendered in evidence.

34. In view of the above, this court finds merit in this appeal. The Respondent appears to have correctly predicted the outcome of this appeal by throwing in the towel early going by her written submissions. The trial court’s finding on quantum is set aside but I find its proposal of Kshs. 150,000 reasonable.

35. The general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal stated in *Mbaka Nguru and another v James George Rakwar* [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

36. Ngugi J in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR stated as follows;

On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding



principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages.

37. The trial court held that it would have awarded Kshs 150,000/- as general damages had the Appellant proved his case. The Appellant has prayed for Kshs 500,000/- while the Respondent has proposed an award of Kshs 100,000/-.
38. Comparative decisions on damages awarded for soft tissue injuries;
- a. In *Lake Naivasha Growers v Muigai Thuka* [2020] eKLR. The court maintained an award of Kshs 250,000/- in general damages for severe soft tissue injuries of the left thigh and soft tissue injuries of the left leg.
 - b. In *Francis Ochieng & Another v Alice Kajimba* [2015] eKLR, the High Court reduced the award from Kshs 500,000/= to Kshs 350,000/- in respect to multiple soft tissue injuries.
 - c. In *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* (2015) eKLR. The award of Kshs. 700,000/ was reduced to Kshs. 150,000/ for injuries to the left elbow, pubic region, lower back and right ankle.
- 39 In view of the above, this court finds that an award of Kshs. 150,000 is justified.
- 40 In the end for the aforesaid reasons, this appeal is allowed in the following terms:
- i. The decision of the trial court is set aside.
 - ii. The Respondent is found 100% liable for the accident.
 - iii. General damages- Kshs. 150,000
 - iv. Special damages – Kshs. 5,655
- 41 The appellant will have costs of this appeal and costs in the Lower Court and interests from date of judgement in the Lower Court.

Dated, Signed and Delivered at Kitui this 24th day of January, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

