



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndungu v Kamande & another (Civil Appeal E040 of 2022)  
[2023] KEHC 24806 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24806 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E040 OF 2022  
GMA DULU, J  
OCTOBER 31, 2023**

**BETWEEN**

**RUTH WAMBOI NDUNGU ..... APPELLANT**

**AND**

**LAWRENCE KIOI KAMANDE ..... 1<sup>ST</sup> RESPONDENT**

**SKYSOLVER LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(From the judgment in Civil Case No. E144 of 2021 delivered by Hon.  
A. M. Obura (Mrs.) (CM) at Voi Law Courts on 8th September 2022)*

**JUDGMENT**

1. In a judgment delivered by the Magistrate’s court on 8<sup>th</sup> September 2022 the trial Magistrate concluded as follows:-
  - “ 15. I have already determined whether the plaintiff proved her injuries in the sister file Voi CMCC No. E160 of 2021 where I found that in the absence of formal production of treatment notes, either through the plaintiff’s own testimony or by consent of the parties, there is no evidence placed before me to facilitate assessment of the plaintiff’s injuries and damages payable. My reasoning and finding in the said suit shall apply here mutatis mutandis.
  16. This claim fails in the circumstances consequently, I hereby dismiss the suit and direct that each party bears their own costs.”
2. Dissatisfied with the trial Magistrate’s court decision above, the appellant has come to this court on appeal through counsel D. K. Wanyoike & Company advocates, on the following grounds: –



1. That the Magistrate erred in law and in fact in failing to appreciate that there was already a test suit, Voi CMCC E79 of 2020 and the appellant and respondent had recorded a consent.
  2. The Magistrate erred in both law and facts by making a finding that the plaintiff had not physically produced documents while there was a suit on issue of production of documents CMCC 162 of 2021.
  3. The Magistrate erred in facts and in law on overlooking all open avenues in rules of natural justice, by dismissing the suit for non production of supporting documents while there were in court file (sic).
  4. The Magistrate erred in facts and law on overlooking that the parties in CMCC 162 of 2021 which had full hearings and documents were produced and was part of the series while CMCC 119/21, CMCC 140/21; CMCC 144/21, CMCC 157/21, CMCC 157/21, CMCC 160/21 had recorded a consent during pre-trial that production of documents be dispensed with.
  5. The trial Magistrate erred in law and fact by failing to appreciate the appellant's pleadings, submissions and only went much further to accept defendant on back trucking of defendant consensus on issue of production of documents during pre-trial, having been settled.
  6. That the trial Magistrate erred in law by ignoring that the court did not proceed to full hearing and the only submissions were allowed by consensus during pre-trial stage.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by D. K. Wanyoike & Company Advocates for the appellant, as well as the submissions filed by Jengo Associates for the respondent. Both counsel relied on decided court cases.
  4. This is a first appeal, and I am required to reconsider the evidence on record, and I am not bound to agree with the trial court's findings and conclusions - see *Selle & Another v Associated Motor Boat Company Ltd* (1968) EA 32 and the case of *Gitobu Imanyara & 3 Others v Attorney General* (2016) eKLR.
  5. The major issue herein in this appeal, is proof of injuries and quantum of damages through documents, either produced by the appellant or by consent, as liability was recorded by consent.
  6. It is trite that even where liability is recorded by consent, the injuries suffered and damages arising therefrom have to be proved by a plaintiff on the balance of probabilities.
  7. I have perused the arguments on both sides with regard to the production of medical documents herein. The appellant's counsel has in his submissions referred to a consent entered in CMCC E79 of 2020 and CMCC 162 of 2020. However, he does not give the contents of the consent, nor list or even identify any of the documents agreed to be admitted by consent, in which formal production was dispensed with. Obviously, for every particular plaintiff, the medical documents would be different as injuries suffered by each person will be different. Thus it was important for the consent to be specific on which documents were referred to in the consent.
  8. Instead of giving specifics, the appellant's counsel went on to argue on whether the appellant should have produced documents physically, and correctly stated that where documents were produced by consent, then there was no need for physical production, and said that the documents were to be produced in CMCC No. 162 of 2021.
  9. Counsel however did not say that the documents relating to his client were produced by consent in CMCC No. 162 of 2021, and instead relied on the case of *Trust Bank Ltd v Paramount Universal Bank*



*Ltd* – Nairobi (Milimani) HCCS No. 1234 of 2001 to state that where documents are produced by consent, the pleadings will not be mere statements as they will now have substantiated the pleadings. These arguments are valid.

10. However, again here, the appellant's counsel does not give the factual situation on when and how the medical documents in this case of the appellant, were produced by consent of the parties in CMCC 162 of 2021, thus leaving the court to guess or imagine that the medical documents of the appellant herein were produced by consent, or were covered in the consent. In my view, it is not a function of the court to make decisions on guesswork, but on evidence or facts placed before it.
11. I must mention here, that I have previously made a decision in a related appeal No. E047 of 2022, in which I delivered a judgment on 11<sup>th</sup> May 2023.
12. Having considered all the record and facts placed before the trial court herein, and the submissions of both counsel for the parties, I come to the conclusion that the trial Magistrate was correct in holding that the appellant did not produce documents to prove injuries and quantum of damages, on the balance of probabilities either by consent or through evidence.
13. I thus find no merits in the appeal. I dismiss the appeal and order that parties bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER 2023 AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred – Court Assistant

Mr. Hamisi Salim holding brief for Mr. Jengo for respondent

