



REPUBLIC OF KENYA



**Njagi v Njoka & 2 others (Civil Appeal 3 of 2020)
[2023] KEHC 24210 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 3 OF 2020
FN MUCHEMI, J
OCTOBER 25, 2023**

BETWEEN

MOSES KARIBA NJAGI APPELLANT

AND

STEPHEN MUCIRA NJOKA 1ST RESPONDENT

LUCY WANJIRU IRUNGU 2ND RESPONDENT

MWANGI NJAU JOHN 3RD RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. L. W. Kabaria
(SRM) delivered on 25th July 2019 in Gichugu SRMCC No. 12 of 2018)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gichugu Senior Resident Magistrate in SRMCC No. 12 of 2018 arising from a road traffic accident whereby by consent liability was apportioned at the ratio of 35: 65 with the respondents bearing 65. The appellant was awarded general damages of Kshs. 630,000/- for pain, suffering and loss of amenities and special damages of Kshs. 3,550/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and in law by awarding the appellant 35% in liability whereas he never submitted for the same;
 - b. The learned trial magistrate erred in fact and in law by failing to note that the appellant had incurred medical expenses for 3 years;



- c. The learned magistrate erred in fact and in law by failing to award the appellant special damages having proved the same.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that according to the medical report by Dr. P. K. Mwangi and the treatment notes he sustained the following injuries:-
 - a. Compound fracture on the right ankle joint;
 - b. Lacerated wound on his right leg from the ankle joint;
 - c. Blunt soft tissue injuries.
5. The appellant submits that he was rendered incapacitated and could not walk for long distances without the assistance of a walking stick which has made him unable to perform his duties. He further states that he sustained grievous harm according to the treatment notes. He contends that the said injuries have impacted his life negatively as he was a farmer and following the accident he cannot carry out farming to sustain himself and his family.
6. The appellant further disputes the ratio of liability apportioned to him and argues that on the material day he was standing near an MPESA shop waiting in line for his turn to carry out some transactions.
7. The appellant relies on the case of *Odinga Jactone Ouma vs Maureen Achieng Odera* [2016] eKLR and submits that the award of Kshs. 630,000/- as general damages was inordinately low as the court did not factor in the nature of his injuries and the degree of incapacitation at 30%. Thus he submits that an award of Kshs. 1,800,000/- will be sufficient compensation.
8. The appellant further submits that he is entitled to a sum of Kshs. 500,000/- as loss of earning capacity and loss of earnings as he was a farmer and business man earning Kshs. 20,000/- per month. He relies on the cases of *Mumias Sugar Company Limited vs Francis Wanalo* (2007) eKLR and *S. J. vs Francesco Di Nello & Another* (no citation given) to support his contention.
9. The appellant further submits that Dr. P. K. Mwangi noted that he would require future medical expenses for physiotherapy. He further contends that the respondents did not controvert the same and therefore he is entitled to future medical expenses.

The Respondents' Submissions

10. The respondents submit that the issue of liability was settled by consent of the parties as indicated in the trial court proceedings on page 84 of the record of appeal. The proceedings confirm that on 4/6/2019, the parties through their advocates appeared before the trial court and recorded a consent on liability as well as consent on the mode of assessment of damages and production of documents.
11. The respondents rely on the case of *Broke Bond Liebig (T) Ltd vs Mallya* (1975) EA 266 and submit that a consent order or judgment can only be set aside on the ground of fraud, collusion and therefore the appellant cannot challenge the consent order dated 4/6/2019 on appeal as he ought to have filed an application in the trial court. Thus the respondents argue that the appellant cannot blame the trial court on the apportionment of liability as the trial court simply adopted the consent of the parties.
12. The respondents state that the appellant had pleaded special damages at Kshs. 3550/- which the trial court awarded. The respondent further argues that the trial court could not have awarded for special



damages for medical expenses incurred by the appellant for three years as alleged, without pleading the same and providing receipts as prove of the same. Furthermore, the respondents submit that the appellant has mischievously tried to introduce new evidence in this appeal as the receipts on pages 16 – 27 of the record of appeal were not part of the documents filed and produced before the trial court.

Issue for determination

13. The main issue for determination is whether the appeal has merit.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this 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,, this 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 into account of particular circumstances or probabilities materially to estimate the evidence.”

15. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

16. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

17. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the consent on judgment dated 4/6/2019 ought to be upheld.

18. The appellant argues that he did not enter into any consent on liability and further argues that at the time of the accident he was standing in line in a MPESA shop waiting for his turn to do carry out some transactions.

19. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of *S. M. N vs Z. M. S & 3 Others* [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:

- a. Where the consent was obtained fraudulently;
- b. In collusion between affected parties;



- c. Where an agreement is contrary to the policy of the court;
 - d. Where the consent is based on insufficient material facts;
 - e. Where the consent is based on misapprehension or ignorance of material facts;
 - f. Any other sufficient reason.
20. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.
21. In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA held the view that:-
- “It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”
22. The Honourable Judge went further and cited *Setton on Judgments & Orders* 7th Edition Vol. 1 page 124 and reiterated that:-
- “Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them.....and cannot be varied or discharged unless obtained by fraud, or collusion or by an agreement contrary to the policy of the court....or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
23. In the instant case, a consent was entered into by both parties through their counsels on 4/6/2019 whereby liability was apportioned at the rate of 65% : 35% as against the respondents. The parties further entered a consent on filing written submissions on the assessment of damages and the production of the appellant’s documents. The trial court adopted the consent as an order of the court. Thus, the appellant cannot claim that he did not enter the said consent because he was represented by his counsel on record in the suit. Furthermore, the appellant did not apply in the trial court to have the consent set aside and neither has he shown that the consent was procured through fraud or collusion or is based on insufficient material facts. Moreover, the appellant cannot bring an application to dispute the consent on appeal while he did not apply for it to be set aside in the trial court. In my considered view, this ground of appeal fails.

Whether the trial court erred in failing to award damages.

24. The appellant argues that the trial court erred by awarding him a sum of Kshs. 630,000/- as general damages as the award is inordinately low. He further submits that an award of Kshs. 1,800,000/- is reasonable compensation for the injuries sustained. The appellant further contends that he is entitled to loss of earnings at the rate of Kshs. 500,000/- as he was a farmer and businessman and made an income of Kshs. 20,000/- per month. He further argues that he is equally entitled to future medical expenses as opined by Dr. P. K. Mwangi in his medical report. Looking at the appellant’s memorandum of appeal, all these heads of damages he claims were not argued in his submissions in the court below. None of them was laid out in the memorandum of appeal. An appellant cannot raise new grounds of appeal by way of written submissions but ought to be raised in the Memorandum of Appeal to enable the respondent sufficient opportunity to address it. This was stipulated in the cases of *Geobe Limited & Another vs Nyaturima Holding Limited t/a Satima Services Limited* [2021] eKLR and *Twaher Abdulkarim Mohammed vs Independent Electoral and Boundaries Commission (IEBC) & 2*



Others[2014] eKLR. Consequently, this court cannot address these concerns as that would amount to injustice to the respondents.

25. The appellant has further argued that he has incurred medical expenses for three years and the same was not awarded by the trial court as special damages. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

26. On perusal of the appellant's Amended Plaintiff dated 19th November 2018, on page 38 – 40 of the record of appeal, the appellant pleaded as special damages Kshs. 3,000/- for the medical report and Kshs. 550 for the motor vehicle search. The trial court awarded the same as they were pleaded and proved. Therefore it is clear that the appellant did not plead the said medical expenses in the trial court and cannot plead the same at the appellate stage. Moreover, the receipts he attached on pages 16 – 27 were attached as part of the list of documents dated 27/12/2017 in the court below however the same were never pleaded nor proved.

27. It is well settled that parties are bound by their pleadings. Pleadings are the bedrock upon which all proceedings derive from. Therefore any evidence adduced in a matter must be in consonance with the pleadings. This settled position was reaffirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002* where Adereji JSC expressed himself thus on the importance and place of pleadings:-

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

28. Consequently, the appellant cannot raise these issues of the receipts at the appellate stage as he never pleaded the same in the trial court despite attaching the receipts in his bundle of documents.
29. In view of the foregoing, I find that this appeal lacks merit and is dismissed with costs to the respondents.
30. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October, 2023.

