Ng'ang'a v Mwangi & another (Civil Appeal E013 of 2022)
[2023] KEHC 26221 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E013 OF 2022

GL NZIOKA, J

NOVEMBER 27, 2023

BETWEEN

BENJAMIN KARIUKI NG'ANG'A ..... APPELLANT

AND

MOSES KARANJA MWANGI ..... 1ST RESPONDENT

CITY LINK HARDWARE ..... 2ND RESPONDENT

(Being an appeal from the judgment delivered by Hon. E. W. Mburu Senior Resident Magstrate (SRM) dated 8th February 2022 vide Civil Case No. 1142 of 2018 at the Chief Magistrate's Court at Naivasha))

JUDGMENT

1. The appeal herein emanates from the Judgment of the trial court delivered on 8th February 2022 vide Chief Magistrate's court at Naivasha in Civil Case No 1142 of 2018 where he was seeking for judgment against the respondents for the following:-
    a. General damages, damages for loss of earnings and earning capacity
    b. Future medical expenses
    c. Special damages
    d. Costs and interest of this suit
    e. Interest on (a) and (d) above from the date of judgment and (c) from the date of filing this suit.
2. The background facts of the case are that, on the 11th day of July 2018, the plaintiff (herein "the appellant") was riding a motor bike registration No KMDK 971M along Mai Mahiu-Naivasha road when he was involved in a road traffic accident with motor vehicle registration No KBD 790F, driven

by and/or owned by the Defendants (herein "the respondents") and as a result he sustained serious bodily injuries.

3. The appellant avers that he sustained the following injuries:

    a. comminuted fracture of the ulna at distal end

    b. displaced fracture of the right radius in the distal one third

    c. displaced fracture of the proximal phalanx of the right 3rd finger,

    d. displaced fracture of the proximal phalanx of the right 4th finger

    e. deep cut wound on the parietal region

    f. deep cut wound on the right arm

4. The appellant attributes the cause of the accident to the respondents, their servant or agent or employee for driving the subject motor vehicle without due care and attention, failing to stop, slow down, brake, serve or manage the motor vehicle, driving at an excessive speed in the circumstances, a defective motor vehicle and under the influence of alcohol. He pleads that the principle of *Res Ipsa Loquitor* applies.

5. However, the respondents denied liability vide a statement of defence dated; 23rd April 2019, and argued that they are strangers to all the averments in the plaint. That, if the accident occurred, which is denied, on a without prejudice basis, then it was caused solely or substantially contributed to by the negligent acts of the appellant.

6. That he was riding the said motorcycle without due care and attention, at excessive speeds, failed to have proper lookout or sufficient regard to traffic and to maintain a safe distance, failed to ride on designated lane, and riding a defective motor bike.

7. The case proceeded to full hearing whereby the trial court held that, both parties contributed to the accident and apportioned liability among the parties in the ratio of 30:70 in favour of the appellant as against the respondents. The award of damages was made as follows: -

    a. General damages----------Kshs 700,000

    b. Loss of earning----------Kshs 000,000

    c. Future medical----------Kshs 100,000

    d. Special damages----------Kshs 13,610

    Total----------Kshs 813,610

    Less 30%----------Kshs 244,083

    Balance----------Kshs 569,527

8. However, the appellant is aggrieved by the trial court's finding on general damages and appeal against it on the following grounds: -

    a. That the learned trial Magistrate erred in law and fact in awarding general damages that were inordinately low in total disregard of the severe injuries that the appellant suffered in the accident

9. As a result, the appellant seeks for orders that: -

a. The appeal herein be allowed.

b. The judgment/decree of the Honourable Magistrate delivered on 8th February 2022 in Naivasha CMCC No 1142 of 2018 be set aside and/or reviewed.

c. This Honourable Court be pleased to re-assess the damages to be awarded to appellant and enhance the same.

d. Costs of this appeal be borne by the respondent.

10. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated; 2nd February 2023, in which he relied on the case of; *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A M Lubia & Olivia Lubia (No 2)* [1982-880 L KAR 727 and *Bhutt v Khan* [1981] KLR 349 where the Court stated that for the appellate court to interfere with quantum it must be satisfied that, the trial court applied the wrong principles or misapprehended the evidence in some material aspect and so arrived at a figure that was so inordinately low or high to represent erroneous estimate.

11. He argued that, the trial court ought to have considered comparable case law in awarding damages and cited Terrell's *Law of Running Down Cases*, 3rd ED. London Butterworths (1964) at page 75 and the case of *H. West & Son Ltd v Shepard* (1964) AC 326, 345 where of Lord Morris Borth-y-Gest stated that comparable injuries should be compensated by comparable awards. That, the trail court failed to consider factors of inflation, severity of the injuries and the age of the authorities.

12. That, he sought for an award of Kshs 4,000,000 and relied on the case of; *Hussein Ahmed Abdullahi v Samira Mohamed Abdi* [2017] eKLR where the court awarded Kshs 2,500,000 for similar injuries to the ones he suffered. That to the contrary, the trial court relied on the case of; Nairobi HCCA No 542 of 2018 *Mathew Thuku v Cyrus Ndungu* where the respondent was awarded Kshs 500,000 as general damages for less severe injuries.

13. Further, courts have granted higher awards for comparable injuries on the limb of pain and suffering. He relied on the case of; *Guardial Singh Ghataurhae v Parminder Singh Mankuu & 3 Otehrs* (2018) eKLR where the plaintiff sustained multiple fractures and was awarded Kshs 2,500,000 for pain, suffering and loss of amenities and the case of; *Samson Simbe v Callen Obonyo Nyangau*(Civil Appeal E037 of 2012) [2022] KEHC 3275 (KLR) (19 July 2022) (Judgment) where the respondent was awarded Kshs 2,000,000 as general damages for multiple fractures.

14. The appellant further submitted that, the trial Magistrate failed to award him loss of earning capacity despite pleading the same. That, he suffered permanent disability of 35% as testified by Dr. Kiamba. That, the medical report by Dr. Wambugu that placed his permanent disability at 10% should be disregarded as the doctor was not called as a witness. He urged the court to award him loss of earning capacity in the sum of Kshs 3,960,000 as per his submissions in the trial court.

15. However, the respondents in submission dated; 8th March 2023 argued that, the appellant was approbating and reprobating and therefore the appeal should be struck. That, their insurer duly paid the appellant the damages awarded by the trial court of Kshs 569,572 vide cheque dated 14th March 2022, before they were served with the memorandum of appeal and were therefore not privy to the existence of the appeal.

16. Further, the appellant's counsel was yet to return the monies despite the fact that they filed the present appeal. That, the court is empowered under Order 42 Rule 32 of the Civil Procedure Rules, 2010 to revise the damages awarded by the trial court downwards and in the circumstances, the appellant

should not be allowed to retain the benefit of the appeal while at the same time seeking for more enrichment.

17. The respondent relied on the case of; *Dr. Sunny Samuel v Simon M. Mbwika & another* [1998] eKLR where it cited with approval the decision in *Industrial and Commercial Development Corporation v Kariuki Gatheca* 1977 KLR 52 where the Court of Appeal of East Africa held that the applicant therein was precluded from attacking the judgment as he was no longer an aggrieved person and was not allowed to approbate and reprobate the judgment.

18. Further, in the case of; *Premier Food Industries Limited v Public Health Prosecutor – Kisumu* [2021] eKLR the court dismissed an application challenging the decision of the taxing officer where the applicant had received payment of taxed costs on the strength of a ruling and held that a court cannot approve where a party approbates and reprobates.

19. The respondents submitted that, the trial Magistrate did not err in assessing the damages and the fact that a different court may reach a different conclusion on the award of damages does not invalidate the trial court's award. They relied on the case of *Omar Athumani Mohammed t/a Paint Work and General Maintenance v Jumwa Kaingu* where the court cited the case of; *Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* where the Court of Appeal of East Africa stated that an appellate court will not ordinarily interfere with the award of damages by a trial judge based on the view that it would have awarded higher or lower damages different from the trial judge.

20. That, the injuries in the plaint were compounded and split to create an impression that they were more severe and extensive than they actually were and were based on the medical report by Dr. Kiamba which was exaggerated. That in the circumstances, the court should be guided by initial treatment notes, discharge summary and the P3 which are unbiased.

21. Furthermore, the medical report by Dr. Wambugu represented a more accurate assessment of the nature of injuries and which Dr. Kiamba concurred with during in his examination in chief.

22. The respondents relied on the case of; *Apex Security Services Limited v Joel Atuti Nyaruri* [2018] eKLR where the court referred to the case of; *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil appeal No 203 of 2001 [2007] 1 EA 139 in dismissing the findings of a medical report, where the Court of Appeal held that expert medical opinion is not binding to the court and that the court is entitled to reject the opinion if upon consideration alongside all available evidence there is a proper and cogent basis for doing so.

23. That, the appellant tried to mislead the trial Magistrate by relying on the case of; *Hussein Ahmed Abdullahi v Samira Mohamed Abdi* [2017] eKLR that had more severe injuries. However, the trial Magistrate noted that the proposed sum was on the higher side and was instead guided by the case of; *Mathew Thuku v Cyrus Ndungu* [2021] eKLR where general damages of Kshs 500,000 had been awarded for comparable injuries. That, the trial court awarded the appellant Kshs 700,000 after factoring in inflation.

24. Furthermore, parties have a duty to appropriately guide the court in the applicable law and relevant caselaw and have no one to blame if they deliberately mislead the court and the court does not consider their submissions on the misleading aspect. The case of *Tarasila Wanja & another v Peter Kirimi Muthuri* [2014] eKLR was relied on, where the court stated that, it could not rely on irrelevant authorities submitted by the appellants.

25. The respondents argued that, the court should not consider fresh authorities cited by the appellant which he failed to present at the trial court as it would amount to allowing him to correct his indolence.

26. Further, the appellant did not plead any permanent disability in his plaint, however, the trial court considered the medical report and initial treatment notes on record. That, in the case of *John. G. Mbuthia & another v Stephen Muiruri Njenga* [2008] eKLR, the court held that the trial court erred in taking into account injuries that were not pleaded and stated that parties are bound by their pleadings and that judgment cannot be given on an item not pleaded.

27. I have considered the appeal in the light of the record of the trial court, the submissions of the parties therein and herein. In recognise the role of the appellate court as stated by the Court of Appeal in the case of; *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

28. The court thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

29. In exercise of the aforesaid mandate, I note the appeal herein is purely on the award on general damages. In assessing the same, the learned trial magistrate stated that, the injuries in the initial treatment notes (sic) were not as severe as stated in the medical report and that, the authorities relied on by the appellant were in relation to sums "too much on the higher side".

30. The appellant had sought for a sum of Kshs 4,000,000 as general damages and relied on the case of: *Hussein Ahmed Abdullahi v Samira Mohamed Abdi* (2017) eKLR. I note that the respondent submissions filed in the trial court are not, in the record of appeal. However, I have taken note of the same in the trial court's file. The respondenst proposed a sum of Kshs 200,000 as general damages and relied on the cases of *Jane Waruguru Miano v Jotham Nguri Magondu & another* (2018) eKLR and *Charles Oriwo Ndeodeyo v Appollo Justus & another* (2017) eKLR.

31. However, the trial court then relied on the case of; Nairobi HCCA No 542 of 2018 *Mathew Thuku v Cyrus Ndungu* and awarded Kshs 700,000 as general damages.

32. The appellant in the submissions herein argues that, the trial court relied on an authority where the injuries sustained by the plaintiff therein were less severe. The appellant has cited several authorities, including *Guardial Singh Ghataurhae v Parminder Singh Mankuu & 3 others* (2018) eKLR

33. The respondent has on its part maintained that a sum of Kshs 700,000 awarded is reasonable. The respondent relied inter alia; on the decision in *Tarasila Wanja & another v Peter Kirimi Muthuri* [2014] eKLR, *Cannon Aluminium Fabricators Ltd v Alex Julius Mativo & another* [2019] eKLR and *John G. Mbuthia & another v Stephen Muiruri Njenga* [2008] eKLR

34. I have considered the arguments and submissions on the subject issue and I note from the evidence the injuries the appellant sustained herein are tabulated as follows:

a. comminuted fracture of the ulna at distal end

b. displaced fracture of the right radius in the distal one third

c. displaced fracture of the proximal phalanx of the right 3rd and 4th finger,

d. deep cut wounds on the parietal region and right arm

35. I note that, the aforesaid injuries are not as severe as those in the authority of; *Hussein Ahmed Abdullahi v Samira Mohamed Abdi* (*supra*) relied on by the appellant, where the plaintiff sustained, fracture of the radius and dislocation distal radio-ulna joint of the left hand, multiple cuts/bruises and soft tissue injuries the left hip and de-gloving injury to the left hand and extensor tendon injury, with permanent partial disability assessed at 20%. These injuries were more severe and that authority is not comparable. On the other part, the authorities relied on by the respondent in the trial court were of injuries that were of relatively less severe than what the appellant herein sustained.

36. In justifying the award, the trial court evaluated the medical documents produced. However, even before I finalise on the subject issue, the respondents have raised an issue that, having been paid the decretal sum, the appellant cannot retain the benefit thereof and appeal against the same. Apparently, the appellant has not responded to the same.

37. In relation to that issue, I find that, the there are varying court authorities on the issue. In the case of: *Dr. Sunny Samuel v Simon M. Mbwika & another* (*supra*) relied on by the respondent, the Court of Appeal denied the applicant's application seeking extension to file his appeal on the grounds that he had been paid the decretal amount in full and stated that: -

> "I have given most anxious consideration to this submission and the point raised. In my judgment, in the circumstances now obtaining, the applicant is precluded from attacking the judgment. He is no longer an aggrieved person.
>
> Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the applicant is entitled to proceed with his appeal.
>
> In not too dissimilar circumstances, Mustafa JA (as he then was) delivering the first judgment of the Court of Appeal for East Africa in the case of *Industrial and Commercial Development Corporation v Kariuki Gatheca* 1977 KLR 52 was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P, agreed in every respect with the judgment prepared by Mustafa, JA and so did Musoke JA"

38. The respondent further relied on the case of; *Premier Food Industries Limited v Public Health Prosecutor – Kisumu* (*supra*) where the court held that: -

> "29. Secondly, I note that the Applicant had already received payment of the taxed costs. The said payment was made on the basis of the decision by the Taxing Officer, who had awarded the costs in the sum of Kshs 200,550/=.
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> 30. Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit.

31. In the case of *Evans v Bartlam* (1937) 2 ALL. E.R. 649, at page 652 Lord Russel of Killowen said;

> " The doctrine of approbation and reprobation requires for its foundation, inconsistency of conduct, as where a man, having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit."

32. It is well settled that the court cannot approve an attitude in which a party approbates and reprobates. For that reason, too, the application before me fails."

39. Similarly, the High Court in the case of *Lucas Adhola Olal v Patrick Mutua Nderitu* [2017] eKLR held that: -

> " The court notes that counsel for the appellant has not denied receiving the cheque. Infact, the submissions by the appellant are very silent on that issue. In the circumstances, the conclusion that this court would make is that the decretal sum was indeed paid. The respondent's letter dated 24th January, 2011 is very clear that the same was paid in full and final settlement. The fact that the appellant's advocate accepted the cheque and went ahead to encash the same, implies that they received it on the same terms that it was forwarded by the respondent and that was "in full and final settlement".
>
> I wholly agree with the finding by Mutungi J. in the case of *Laban Onono & another v Dan Owiti* (supra) "that the subject matter of the appeal herein having been paid in full, even if it were to be heard, serves no purpose, and would be a waste of valuable judicial time.
>
> Having said that, I find and hold that the appeal herein is incompetent and the same is dismissed with costs to the respondent."

40. However, other courts have held that payment of the decretal amount does not extinguish a party's statutory right to appeal against the decision of a court where such party feels aggrieved. In the case of; *Machakos District Co-Operative Union Limited v Philip Nzuki Kiilu*[1997] eKLR the Court of Appeal in allowing the applicant to reinstate his appeal dismissed the respondent's argument that the decretal sum had been paid and stated that:

> " Mrs. Mwangangi also argued that there is no point in appealing as the decretal sum has been paid. With respect, payment of decretal sum does not take away a right of appeal."

41. Similarly, the High Court in the case of; *Bash Hauliers Limited v Peter Mulwa Ngulu* [2020] eKLR stated that: -

> " 27. It was again contended that it was an abuse of the court process for the Respondent to proceed with the appeal after the decretal sum had been settled. A not too dissimilar issue arose before the Court of Appeal in *Machakos District Co-Operative Ltd. v Nzuki Kiilu* Civil Application No Nai 17 of 1997 where it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court (Shah, JA) however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal. Waki, JA, on his part in *Seventh Day Adventist*

Church East Africa Ltd. & another v M/S Masosa Construction Company Civil Application No Nai. 349 of 2005 held that:

> " "Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

28. It follows that the mere fact that a party has paid or has been paid the full decretal sum does not preclude him or her from preferring an appeal where he/she is dissatisfied with the award. It may well be that he/she feels, as the Respondent herein, that the award was not sufficient. In fact, the general rule is that once judgement is made, it ought to be settled notwithstanding the fact that one may or may not have appealed since an appeal does not act as automatic stay of execution.

29. It is therefore my view that the fact of settlement of the decretal sum herein did not preclude the Respondent from proceeding with his cross-appeal and a person exercising his/her constitutional right cannot be said to be abusing the court process."

42. Furthermore, in the case of; *Ismael Lonkishu Kobei v David Kariuki Gichangi & another* [2017] eKLR the applicant was seeking for an order to dismiss the appeal before the court on the grounds that the decretal sum was paid in full. However, the court in dismissing the application held that: -

> " Section 65 (1) (b) confers a right of appeal on an aggrieved party to challenge a judgement of a magisterial court. The appeal of the appellant was admitted into hearing by this court on 28/6/2017 pursuant to section 79 of the *Civil Procedure Act*. The effect of such an admission is that the appeal is not frivolous. It is also not an abuse of the court process. A statutory right of appeal guarantees a fair trial. If the trial court committed errors of law or fact, the appeal court is at liberty to review and correct those errors. The right of appeal which is conferred upon the appellant can only be taken away by another statute.
>
> 6. Furthermore, the invocation of section 3A of *Civil Procedure Act* which saves the inherent powers of the court cannot defeat the express provisions of section 65 (1) (b) of the *Civil Procedure Act*. In the circumstances, I find that the provisions of section 3A cannot defeat the provisions of section 65 (1) (b) of *Civil Procedure Act*. Additionally, the provisions of section 1A and 1B of the *Civil Procedure Act* are not applicable to the instant appeal. Those provisions are in relation to the just determination and efficient disposal of court cases in terms of section 1B of the *Civil Procedure Act* whose main objective is to require the courts to facilitate the just, expeditious, proportional and affordable resolution of civil dispute. It is therefore clear that those provisions are of no assistance to the respondents.
>
> 7. The equitable doctrine of "clean hands" and the rule that one cannot approbate and reprobate at the same time cannot override the appellant's statutory right of appeal."

43. To revert back to the subject herein, I note that, the appellant received the decretal sum and then proceeded to file the appeal. In my considered opinion, it is not just, fair and reasonable to allow a party to accept the decretal sum and to continue to pursue the other party, who in that case, is not even a judgment debtor after settling the decretal sum.

44. There are several questions that arise when you allow a litigant to have double benefits as against the other party. Firstly, assuming the appeal fails and the appellant is unable to refund the money, how will the other party recover the money? Secondly, how does one address interest that would have accrued on the sum already paid, if had it been held in an interest earning account? Thirdly, what protection does the respondent retain? For how long can a party be pursued in litigation especially without knowledge of how long the appeal may take?

45. In my considered the appellant has to choose to refund the money paid back with interest and pursue the appeal or keep the money and be satisfied. To allow the appellant to retain the same amounts to a double bite on the cherry.

46. As the appellant has an opportunity to litigate further in case he exercises the option to refund the money and pursue the appeal, the court will not prejudice the matter by making final order on the merit of the case.

47. The upshot of the aforesaid is that, the appeal is not allowed. Costs thereof to the respondents.

DATED, DELIVERED AND SIGNED ON THIS 27TH DAY OF NOVEMBER 2023.

GRACE L NZIOKA

JUDGE

In the presence of:

Ms. Kiberenge for the appellant

Mr. Kisilah for the respondent

Ms. Ogutu court assistant