



REPUBLIC OF KENYA



KENYA LAW
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**Manyala v Omollo (Civil Appeal E017 of 2021)
[2022] KEHC 10900 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E017 OF 2021
RE ABURILI, J
MAY 31, 2022**

BETWEEN

BERNARD ONYANGO MANYALA APPELLANT

AND

JACKIM ODHIAMBO OMOLLO RESPONDENT

(An appeal from the Judgment and Decree of Hon. S.W. Mathenge delivered on 10th March 2021 in Bondo Principal Magistrate's Court Civil Suit No. 109 of 2019)

JUDGMENT

Introduction

1. The appellant herein Bernard Onyango Manyala was the plaintiff in the lower Court. He filed suit against the Respondent then defendant vide a plaint dated 11th August 2019 seeking general damages, special damages, costs of the suit and interest for injuries he allegedly suffered on 19.4.2019 when the respondent's motor vehicle registration number KCH 457M that he was travelling in as a passenger along Ragengni Luanda road at Naya, was driven negligently that it veered off the road and overturned thereby occasioning the appellant injuries.
2. The respondent entered appearance on the 27.8.2019 and filed a statement of defence dated 26.8.2019 putting the appellant/ plaintiff to strict proof of every allegation while denying negligence on his part.
3. During the hearing of the suit, the parties entered a consent on liability on the 10.2.2021 in the ratio of 80:20 in favour of the appellant against the respondent.
4. In her judgement impugned herein, the trial magistrate found that the appellant did not produce any treatment notes showing evidence of the injuries that he had allegedly suffered and concluded that the appellant did not suffer any injuries on the 19.4.2019 as alleged and as such proceeded to grant the appellant only special damages of Kshs. 550 which she stated were proved.



5. Aggrieved by the trial court's decision, the appellant filed his memorandum of appeal dated 3rd June 2021 on the 8th June 2021 in which he raised the following four grounds of appeal:
 - a) The learned trial magistrate erred in both law and fact in arriving at a decision which was not only manifestly unjust but also against the weight of evidence on record.
 - b) The learned trial magistrate erred in both law and fact in failing to appreciate the fact that the appellant had a good case against the respondent.
 - c) The learned trial magistrate grossly misdirected herself in treating the evidence before her superficially and consequently coming to a wrong conclusion on the same.
 - d) The learned trial magistrate misapprehended the evidence on record to a material degree resulting in her arriving at a wrong conclusion.
6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. It was submitted that the appellant adduced sufficient evidence on the circumstances leading to the accident and that the trial court's judgement dismissing the entire suit was unfair and as such the appellant proved his case on a balance of probabilities as required in law and set out in the case of *Kirugi & anor v Kabiya & 3 others* (1987) KLR 347.
8. It was further submitted that the trial court failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law failing to appreciate that the respondents conceded to 80% liability.
9. It was submitted that it was not disputed that the accident occurred or that the appellant sustained the injuries as listed in the P3 form or that he was treated in more than one hospital and as such the appellant proved her case beyond reasonable doubt.

The Respondent's Submissions

10. It was submitted that the burden of proof on the injuries sustained lay with the appellant which he failed to prove as he gave contradictory evidence on the injuries suffered and further that he failed to provide treatment notes for the injuries he claimed to have suffered but instead provided a sick sheet which did not show any injury that the appellant suffered.
11. It was submitted that had the court found that the appellant suffered any injuries, an award of Kshs. 30,000 as general damages could have been fair and reasonable.

Analysis and Determination

12. I have considered this appeal; submissions made on behalf of the parties and the authorities relied on. I have also perused the record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate the evidence, reconsider it afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.
13. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.

14. From the memorandum of appeal and rival submissions, I find the issue for determination in this appeal is whether there is any reason at all to disturb the trial court's finding that the appellant did not prove that he was injured following the accident to warrant an award of general damages.
15. The evidence adduced in support of general damages was as follows: the appellant testified as PW1 and stated that he was involved in an accident on the 19.4.2019 from which he had not healed. He testified that he had a problem on his legs and hands and that he also sustained injuries on his head and was thus praying for compensation.
16. In cross-examination the appellant testified that he was injured on his right arm, left leg and on his head. He stated that a broken glass cut his arm and that he injured his leg when the vehicle was rolling. The appellant further testified that his head was cut by the glass and that his arm and head had healed. He stated that his leg was still in pain and that he still felt pain when it rained.
17. The law is clear that he who alleges must prove. Section 107 of *Evidence Act* defines Burden of Proof as— of essence the burden of proof is proving the matter in court. Subsection (2) Refers to the legal burden of proof.
18. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
19. The question therefore is whether the appellant herein discharged the burden of proof that he suffered the injuries pleaded in his plaint.
20. The appellant herein claimed to have sustained some injuries as a result of the accident that occurred on the 19.4.2019 as evidenced by the abstract produced by the plaintiff as PEX5. The appellant pleaded that he suffered the following injuries;
 - a) Injury on the head
 - b) Injury on the neck
 - c) Injury on the chest
 - d) Injury on the back
 - e) Injury on the left and right hands
 - f) Injury on the left and right legs
21. The appellant produced a medical report dated 6.5.2019 prepared by Dr. L.W. Okombo- produced as PEX4, setting out the injuries allegedly sustained by the appellant. The appellant also produced in support of his injuries, PEX7, a sick leave letter dated 3rd May 2019, about 14 days from the date of the accident from Port Florence Community Hospital whose contents provide that the bearer of that letter be granted 3 days to enable him recover fully. I do note that no treatment notes were produced by the appellant.



22. The appellant submitted that the court ought to have noted that the respondent conceded to 80% liability and further that it was not disputed that the accident occurred or that the appellant sustained the injuries as listed in the P3 form or that he was treated in more than one hospital and as such the appellant proved his case as required on a balance of probabilities. However, no P3 form was produced in evidence although it was listed as one of the documents the appellant was to produce in evidence. In addition, concession on liability is not in itself proof of injuries suffered.
23. In this case, the appellant testified that as a result of the accident, he sustained injuries on the head, legs and hands. In cross examination, he stated that he sustained injuries on his left leg, right arm, a broken glass cut his arm and he injured his leg when the vehicle was rolling. These injuries are similar to those pleaded and as contained in the medical report of Dr Okombo dated 6/5/2019.
24. The trial magistrate dismissed the medical report by Dr. Okombo on the ground that the same was presented in a vacuum as it presented different injuries to those suffered by the plaintiff.
25. However, this is not the case as presented herein above, the injuries sustained by the appellant as pleaded were materially and substantially the same listed in the medical report by Dr. Okombo. The appellant also testified on the injuries that he allegedly suffered as a result of the accident, which injuries agreed, substantially, with those listed in the plaint and the medical report with minor variations.
26. The Respondent's counsel did not challenge those injuries in cross examination of the appellant. Neither do I find any material contradiction or discrepancy between the pleaded injuries and those testified on by the appellant.
27. In *Amalgamated Sawmills Limited v Joseph Njoroge Matheri* [2010] eKLR Emukule J pointed out that there may be circumstances when a treatment card need not be produced, and its absence would not be fatal. The learned judge observed as follows:

“Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a Doctor's Report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim.”
28. I add that where the pleaded injuries agree with the testimony tendered by the plaintiff, then the court has no reason to doubt that the plaintiff sustained injuries, except where the contrary is proved. It is on this basis that I find that the plaintiff/ appellant herein sustained the injuries as pleaded and testified on and therefore the trial court ought to have proceeded to assess quantum of damages to the appellant as the injuries pleaded in his plaint were supported by the medical report of Dr. Okombo.
29. I am therefore persuaded that the appellant proved, on a balance of probabilities, that he had suffered the injuries claimed in his plaint.
30. I shall now proceed to assess the quantum of general damages awardable to the appellant.
31. The trial magistrate stated that the injuries stated in the plaint attracted an award of Kshs. 90,000. She did not offer reasons for the same.
32. I have taken the step of considering comparable awards previously made and relied on the following cases:
33. In *Fred Barasa Matayo v Channan Agricultural Contractors* {2013} eKLR: The court reviewed downwards an award of Kshs. 250,000/= to Kshs. 150,000/= to moderate soft tissue injuries that were expected to heal in eight months' time



34. In *Dickson Ndungu v Theresia Ottieno & 4 others* {2014} eKLR: The court reviewed the award of Kshs. 250,000/- to Kshs. 127,500/= for soft tissue injuries which produced no complains.
35. 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.
36. In *FM (Minor suing through Mother and next friend MWM) v INM & another* [2020] eKLR the court set aside the award of Kshs. 60,000 with one of Kshs. 100,000 for blunt injuries to the head, neck, thorax, abdomen and limbs.
37. In the circumstances of this case, the appellant sustained soft tissue injuries with no permanent disabilities noted. I find that an award of Kshs. 100,000 general damages would be sufficient compensation for the appellant.
38. The special damages were not disputed in this appeal. In the end, I set aside the judgment of the trial magistrate on quantum and substitute it with judgment for the appellant against the respondent on liability as agreed in the ratio of 80: 20, on quantum, I award the appellant the sum of General Damages- Kshs. 100,000 less 20% contribution. Total kshs 80,000 plus specials of Ksh 550. Total 80,550. General damages will earn interest at court rates from date of judgment in the lower court until payment in full whereas special damages will earn interest from the date of filing suit until payment in full.
39. On costs, I order that each party shall ear their own costs of this appeal as it would not have been necessary had the appellant properly and meticulously prosecuted his case in the lower court.
40. I so Order.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 31ST DAY OF MAY, 2022(VIRTUALLY)

R.E. ABURILI

JUDGE

