



REPUBLIC OF KENYA



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**Odhiambo v Omollo (Civil Appeal E018 of 2021)  
[2022] KEHC 10724 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10724 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E018 OF 2021  
RE ABURILI, J  
MAY 31, 2022**

**BETWEEN**

**EVERLINE AKOTH ODHIAMBO ..... APPELLANT**

**AND**

**JACKIM ODHIAMBO OMOLLO ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. S.W. Mathenge Resident Magistrate delivered on 10th March 2021 in Bondo Principal Magistrate's Court Civil Suit No. 108 of 2019)*

**JUDGMENT**

**Introduction**

1. The appellant herein Everline Akoth Odhiambo was the plaintiff before the lower court. She instituted suit vide a plaint dated 11<sup>th</sup> August 2019 against the respondent Jackim Odhiambo Omollo seeking general damages, special damages, costs and interest, being compensation for the injuries that she allegedly suffered on 19.4.2019 as a result of a road traffic accident while she was travelling as a fare paying passenger in motor vehicle registration number KCH 457M along Ragengni Luanda road at Naya when the respondent's vehicle was allegedly driven negligently causing it to veer off the road and overturn occasioning her injuries.
2. The respondent entered appearance on the 27.8.2019 and filed a statement of defence dated 26.8.2019 denying the appellant's claim and seeking strict proof of every allegation while denying negligence on his part.
3. Later, on the 10.2.2021, the parties' counsel recorded a consent on liability in the ratio of 80:20 in favour of the appellant against the respondent.
4. In her judgement, the trial magistrate found that there were many inconsistencies in the appellant's testimony that watered down her evidence and credibility to the point that the trial court concluded



that the appellant never sustained any injuries from the accident of 19.4.2019, to warrant any quantum of damages payable.

5. Aggrieved by the trial court's judgment and decree dismissing her claim for damages, the appellant filed her memorandum of appeal dated 3<sup>rd</sup> June 2021 on the 8<sup>th</sup> June 2021 setting out the following four grounds:
  - 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 court gave directions for the appeal to be canvassed by way of written submissions.

### **The Appellant's Submissions**

7. On behalf of the appellant, counsel 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. It was further submitted that the respondent admitted 80% liability through the consent recorded in the trial court.
8. It was the appellant's Counsel's submission that the appellant proved her case on a balance of probabilities as required by law and as set out in the case of *Kirugi & Anor v Kabiya & 3 Others* (1987) KLR 347.
9. Further submission on behalf of the appellant was that the trial court failed to act judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision which is unsustainable in law and failing to appreciate that the respondents conceded to 80% liability.
10. 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 she was treated in more than one hospital and that as such, the appellant proved her case beyond reasonable doubt. It was further submitted that the medical report by Dr. Okombo clarified the injuries sustained by the appellant.

### **The Respondent's Submissions**

11. On behalf of the Respondent, it was submitted that the burden of proof on the injuries sustained lay with the appellant which she failed to prove as she gave contradictory evidence on the injuries suffered and further that the treatment notes she produced from Mbita dated Hospital 7th June 2019 showed that she was treated for general body pain and not a Road Traffic Accident.
12. 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**

13. I have considered the grounds of appeal, the written submissions filed on behalf of the parties and the authorities relied on. I have also meticulously perused the trial court 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 arrive at its own conclusion, bearing in mind that it neither saw nor heard the witnesses testify and therefore give an allowance for that. This is the principle espoused in section 78 of the *Civil Procedure Act* and considered by the courts in many decisions. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that:

“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 grounds of appeal contained in the memorandum of appeal and the parties’ counsel’s rival submissions, the main issue arising for this court’s determination is whether there is any reason at all to disturb the trial court’s findings on whether the appellant sustained any injuries capable of being compensated by way of an award of general damages. I am guided on this issue by the holding in *Butt v Khan* [1978] eKLR where it was held that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge, in this case, the magistrate, proceeded on wrong principles, or that he misapprehended the evidence in somewhat material respect, and so arrived at a figure, which was either inordinately high or low.”

15. The evidence by the appellant in support of her claim for general damages was as follows: The appellant adopted her witness statement dated 11.8.2019 and testified as PW1. She stated that she worked as a guard at Mbita Law Courts. She recalled that on the 19.4.2019, she was involved in an accident involving the respondent’s motor vehicle in which she sustained injuries to the head, neck, chest, left hands and both legs as was evident from her statement dated 11.8.2019 which she adopted as evidence in chief.
16. It was her testimony that she sustained chest injuries and injuries to the waist and that she still experienced pain in her chest when it gets cold. She testified that her wrist was still painful and that she could not till like she used to.
17. In cross-examination, the appellant stated that though the report stated that she did not suffer any injuries, she did suffer some. She testified that apart from Mbita Hospital, she also went to St. Mary’s Hospital and Port Florence Hospital though she had not presented treatment notes from the latter two hospitals. The appellant further stated in cross-examination that at St. Mary’s hospital, she was referral to go for an Xray at ICIPE.
18. She further testified that the accident occurred between 10am to 11am and that afterwards, she was taken to Madiany Hospital where she was treated though she did not have treatment notes. She stated that she went to Mbita sub-county Hospital thereafter on 20.4.2019.
19. The appellant further stated that on the 20.4.2019, she went to St. Mary’s. hospital. She also stated that she did not go to Port Florence on 20.4.2019 but on the 21.4.2019. She then stated that she went to Mbita sub-county Hospital in April. It was her testimony that PEX6 had a date of 7.6.2019 showing that she was treated for general body pains not Road Traffic Accident. The appellant again stated that on 17.7.2019 she also went to hospital.



20. The appellant testified in cross-examination that she saw Dr. Okombo on 6.5.2019. She reiterated that she sustained injuries on her chest and waist and denied the suggestion that it was not true that she was in the accident nor did she sustain any injuries. She further stated that PEX2 showed other injuries other than those to the chest and waist that she had not disclosed to court.

### **Determination**

21. I have considered the appeal herein and the submissions for and against the appeal. 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.
22. The section provides that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
23. Section 108 further provides that:
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
24. Under section 109 of the Evidence Act:
- “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
25. The standard of proof in civil proceedings is on a balance of probabilities, as stated by the Court of Appeal in Daniel Kibet Mutai & 9 Others v Attorney General (2019) eKLR. The Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, stated as follows concerning the degree of proof:
- “Denning J, in Miller -vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; - “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not.
- This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
26. In Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated concerning the burden of proof that:
- “And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from



those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

27. 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. Thus, whoever has the obligation to persuade 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. In this case, as earlier stated, being a civil suit, the standard of proof required of the plaintiff is that on a balance of probabilities.
28. The only issue for determination is therefore is whether the appellant herein discharged the burden of proof that she suffered the injuries pleaded in her plaint. The law is clear that he who alleged must prove and that parties are bound by their pleadings. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -
- “In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
29. It follows that any evidence led by any of the parties which does not support the averments in the pleadings or at variance with the assertions of the pleadings goes to no issue and must be disregarded.
30. The appellant testified that she sustained some injuries as a result of the accident that occurred on the 19.4.2019. She stated that she got injured on her chest and waist. In her plaint, it was pleaded that the plaintiff suffered the following injuries:
- a. Injury on the head
  - b. Injury on the neck
  - c. Blunt injury on the chest
  - d. Injury on left hand
  - e. Injury on the left and right legs
31. The only medical evidence adduced to prove that the appellant sustained injuries was the medical report dated 6.5.2019 prepared by Dr. L.W. Okombo and which was produced as PEX2 wherein the Doctor listed the appellant’s injury as those pleaded in the plaint. No doubt, the plaintiff’s counsel must have used the said medical report to enumerate the injuries.
32. In the aforesaid medical report, Dr. Okombo stated that the appellant was treated at Jaramogi Oginga Odinga Teaching and Referral Hospital.
33. On the part of the plaintiff, in her testimony in cross examination, she stated that she went to Mbita Hospital, St Mary’s Hospital and Port Florence Hospital. She however could not recall when she went to the St Mary’s ad Port Florence Hospitals. She also admitted that she had not produced any treatment notes from the above latter hospitals. She then stated that she was taken to Madiany Hospital after the



- accident which took place at about 10.am and on 20<sup>th</sup> April 20219 she went to Mbita Sub County Hospital.
34. She also stated that she went to St Mary’s Hospital on 20/4/2019 and that on 21/4/2019 she went to Port Florence Hospital. She further testified that PEX2 which is the medical report had other injuries listed and which she had not stated in court, and that among those injuries listed, only the injury to the chest is what she had mentioned in court and that injury to the waist was not listed therein. I observe that the injuries listed in the adopted statement are the same as those enumerated in the plaint and medical report by Dr. Okombo.
35. The appellant also produced in support of her injuries, PEX6, a patient’s record book from Mbita sub-county Hospital that on the first page was stamped with the date 7.6.2019 a date that she testified before court she was treated for other ailments and not injuries arising out of the road traffic accident of 19.4. 2019. In her statement as adopted, she stated that she was issued with a P3 form which was filled and the original thereof returned to the Police. No copy of that P3 form was ever produced in evidence although it was listed as one of the documents to be produced in evidence at the hearing. No reasons were advanced for non-production of a P3 form which is a public document normally issued by the Police to an injured person to take to the Clinician or doctor for filling. The appellant only produced a police abstract report which lists her as one of the passengers in the respondent’s motor vehicle and that she sustained harm.
36. This court is aware that even oral evidence can be relied on to prove one’s case. In addition, that failure to produce treatment notes is not necessarily fatal to a party’s case. For example, in *Comply Industries Limited v. Mburu Simon Mburu* C.A No.121 of 2005 D. K Maraga, J. (as he then was) observed that failure to produce treatment card does not always lead to dismissal of injury claims. However, where one adduces documentary evidence, then the evidence in the document must be credible and consistent with the oral testimony as a document cannot be amended by the oral evidence.
37. In *Wareham t/a A.F. Wareham and 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal set out the duty of the Plaintiff in the adversarial system and stated that:
- “[W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree there of is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail.”
38. The above case was cited with approval by Meoli J in *Malonza Ivutha v Polysack Company Ltd* [2019] eKLR where the learned judge upheld the decision of the trial magistrate dismissing the appellant’s claim for damages on account that he did not discharge the burden of proving that he sustained any injuries as a result of the traffic accident, owing to the discrepancies in his evidence both oral and documentary on the injuries allegedly sustained.
39. In the case of *Fadna Issa Omar v Malne Sirengo Chipso & 3 others* [2016] eKLR where Githua J stated:
18. In a situation like this where the doctor or health professional who treated an accident victim or filled the P3 form long after the accident had occurred is not availed as a witness, production of the treatment notes recorded by the doctor who first saw the victim, in this case the appellant



when she first sought treatment was critical to prove not only the nature of the injuries sustained if any but also the date they were sustained.

19. It is worth noting that the appellant did not offer any explanation for failure to tender in evidence the treatment notes. In the absence of such primary evidence and considering that the p3 form was filled over a month after the accident, it was impossible for the trial court to make a finding of fact that the injuries noted in the P3 form were indeed sustained in the accident as pleaded and not on any other subsequent date.”
40. In *Peter Migiro v Valley Bakery Limited* [2015] eKLR Mulwa J after analyzing the evidence, was:

“...not convinced that the respondent was injured on the 27<sup>th</sup> December 2002 as no proof of whatever nature was produced. The respondent failed to call witnesses to confirm the same yet he stated that he was working with other employees. He too failed to discharge his burden to prove that he was treated at the company's clinic on the day of the alleged injury before going to St. Peters Clinic next day. Even then, he failed to produce the treatment notes from the said clinic. As I have stated above, the alleged treatment notes were marked for identification and are not filed in the court record. I have not seen them at all. These are the same notes that informed the preparation of the Medical Report by Dr. Obed Omuyoma, and upon which the trial court based its assessment of damages. It has been held in different courts that initial treatment notes are so important that without their production, it would be difficult for a court to ascertain if indeed a claimant was indeed injured.”
41. It is now established that treatment notes are essential to contextualize and correctly place the date, time, nature and extent of the alleged injuries. The main evidential object is to ensure that there are no intervening circumstances that may give rise to doubts concerning the occurrence of the alleged injury or as to their nature and extent, and mode of treatment. Nevertheless, the determination as to whether the absence of treatment notes is fatal depends on the circumstances of each case, and whether there is other corroborative evidence of the accident and injuries.
42. I have carefully perused the treatment book from Mbita Sub County Hospital. It is dated 7/6/2019 OP No. 3382/19. The appellant went to that hospital complaining of general body pains for two months. The other complaint is not clear but seems to be chest pains and underneath is indicated involved in RTA 2 months ago. It also states that Xray was done but no significant internal body injury was noted and Implication is indicated as STI. I have searched through google engine for what STI stands for in medical terms since the maker of that document did not attend court to clarify and or to be cross examined on the terms used in the document by way of initials and found that STI stands for Sexually Transmitted Infections. the appellant was then advised to rest from any strenuous activity and given medication and also advised to continue with medication from Sori Lakeside Hospital. She returned to the same hospital- Mbita Sub County Hospital on 17/7/2019 and was found to be doing well.
43. Indeed, although the appellant testified that she sustained injuries following the accident wherein liability had been conceded to some extent, the inconsistencies cited above from her testimony, which did not mention any injuries in any other part of the body other than chest and waist, yet in the plaint and medical report, the injuries enumerated are numerous, this paints a hard picture for one to believe that indeed the appellant suffered any injuries as claimed in her plaint or that she sought treatment for the alleged injuries and if she did seek for treatment, the court cannot tell in which hospital she first sought that treatment.
44. The medical report that was, albeit produced as her evidence and consented to by the respondent, contradicts her own testimony. Dr. Okombo states that the appellant was treated at JOOTRH



something that the appellant does not state in her own testimony. The testimony by the appellant was substantially at variance with her pleadings and the medical report.

45. In my view, this points to the appellant making up the injuries that she did not sustain at all. Further, the appellant admitted in her own testimony that the treatment notes produced as PEX6 related to other ailments and not injuries arising out of the road traffic accident of 19.4.2019. She also stated in cross examination that when she visited Mbita Sub County Hospital, she was treated for general body pain and not road traffic accident injuries.
46. In my view, the disparities between the pleadings and the oral testimony as well as the documentary evidence tendered by the appellant were not explained at the trial and therefore it clearly appears that the doctor's report seemed to confirm the injuries that had not been sustained by the appellant.
47. I hasten to add that it is not always the case that one must sustain injuries following an accident and this case falls in those categories of cases where one emerges from an accident unscathed. Where this happens, one should thank the almighty God for sparing their lives instead of making up injuries that were never suffered, even if liability was conceded.
48. I am alive to the fact that in some instances, one may be involved in an accident and not experience any injuries on the spot but much later. Had this been the case in this case, then it was upon the appellant to prove that she sustained injuries which only manifested themselves later. In the instant case, even if this court was to believe that the appellant sustained injuries, then why was her testimony so contradictory. Further, the medical report by Dr. Okombo claims that he took her medical history then examined her and also referred to treatment documents.
49. The only hospital that the appellant is said to have mentioned to the Dr. was Jaramogi Oginga Odinga Teaching and Referral Hospital. This was on 6/5/2019. If it is true that she was treated at JOOTRH, then why did she not tell the court so instead of saying that she was treated at Madiany. And where is the evidence that she was treated at JOOTRH or at Madiany? Why did she fail to avail the documents from any of those hospitals or even apply on appeal, to adduce additional evidence? Those contradictions and unanswered questions in my humble view are material and water down the credibility of the appellant's testimony that she suffered any injuries for which she sought treatment.
50. In the case of *Meru South Farmers Co-operative Union Limited v Moses Otando Munaka & another* [2015] eKLR, it was held, persuasively that:

“In this appeal, damages can only be assessed based on the injuries suffered. It is therefore difficult to quantify the amount. Failure to tender medical showing the kind of injuries sustained is fatal unlike the authority cited by the trial magistrate. Damages are awarded purely not only on the injuries suffered, but, on the extent, or seriousness of such injuries. The damages awarded are pegged on such injuries. Without the evidence, it is impossible to assess the damages. With respect, the trial magistrate fell into error. There was no credible medical evidence to prove the injuries suffered by the 1st Respondent. There was therefore no basis to award damages.”

51. Further, the Court of Appeal in *Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another* [2000] eKLR held that:

“We have come to the inevitable conclusion that, unfortunately for the plaintiff, despite his indefatigable efforts to bring the first defendant to justice, the plaintiff failed to prove his case as he is required to by law. We sympathise with him but sympathy is not enough. He may have been injured but the law must be observed. His undoing was that he presented



his case with a lot of assumption and unfortunately the learned Judge went along with him. There was no justification to ignore elementary principles of law and procedure.”

52. In Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others (supra), the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC (supra) as follows:

“... 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 ...”

53. In this case, I find that the appellant presented her case with a lot of assumptions. She was very casual in the prosecution of her case and assumed that since liability had been conceded, then it was automatic that she will be awarded damages without her proving any injuries suffered. I can only sympathise with her but do nothing for her.

54. For the aforesaid reasons, I find that the appellant’s suit was properly dismissed and I can find no reason to fault the trial magistrate. I find no merit in the grounds urged in this appeal and find that the appellant failed to prove on a balance of probabilities that she suffered the injuries that she alleged in her plaint.

55. I am in agreement with the trial court that the appellant failed to prove the nature of her injuries, if any, and as such the trial court was unable to quantify the same. The trial court could only have quantified injuries proven on a balance of probabilities to have been sustained.

56. The upshot of the above is that I find this appeal devoid of merit. I dismiss it and uphold the judgment of the trial court dismissing the appellant’s claim on general damages.

57. On costs, I find that the appellant’s suit was poorly prosecuted in the lower court with many assumptions. I shall not punish the innocent party to bear costs. I order that each party bear their own costs of this appeal.

58. This file is closed.

59. I so order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF MAY, 2022**

(virtually to the parties’ counsel with only the Respondent’s Counsel present although the judgment date was taken by the appellant’s counsel

**R.E. ABURILI**

**JUDGE**

