



REPUBLIC OF KENYA



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**Patel v Kamau & another (Civil Appeal 46 of 2019)
[2022] KEHC 10992 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 46 OF 2019
GWN MACHARIA, J
JULY 29, 2022**

BETWEEN

MAINESHKUMAR KENTILALA PATEL APPELLANT

AND

AYUB KARURI KAMAU 1ST RESPONDENT

REUBEN ONDIEKI OPINI 2ND RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha in CMCC No 412 of 2016 delivered by Hon K Bidali, CM on September 18, 2019.)

JUDGMENT

The Appeal

1. The instant appeal is with respect to the judgment by Hon K Bidali (CM) delivered on September 18, 2019 in CMCC No 412 of 2016 where the trial court found in favour of the 1st respondent as follows:
 - a) Liability in the ratio of 85:15% in the plaintiff's favour by consent of parties
 - b) General damages kshs 800,000.00
 - c) Special damages kshs 17,280.00
2. Additionally, the 1st respondent was awarded costs.
3. The appellant being aggrieved by the said decision of the learned trial magistrate instituted the present appeal vide a Memorandum of Appeal dated October 15, 2019 in which it prayed that the court do reverse the judgment on liability and reassess the awards.



Grounds of appeal

- a. That the learned magistrate erred in law and fact by making an award of 85:15 on liability which was against the weight of the evidence.
 - b. That the learned magistrate erred in law and in fact in making an award on quantum without hearing the direct oral testimony of the plaintiff and a doctor.
 - c. That the learned magistrate erred in law and in fact without considering the defendant's documentary evidence on record.
 - d. That the learned magistrate erred in law and in fact in making an award in general damages that was excessive regards being to decided cases.
 - e. That the learned magistrate erred in law and in fact by considering an extraneous matter in awarding general damages leading to erroneous assessment thereof.
 - f. That the learned magistrate erred in law and in fact in awarding the claim on special damages in spite of the failure to plead and prove.
 - g. That the learned magistrate erred in law and in fact by awarding costs in the absence of evidence of demand and notice.
4. The appeal was canvassed by way of written submissions.

Background

5. The 1st respondent's claim is founded on negligence. It was averred by the 1st respondent that on February 11, 2016 or thereabout while he was lawfully travelling as a passenger in motor vehicle registration no KCF 250Y owned and/or controlled by the appellant and/or their agents when the same was recklessly and negligently controlled that it collided with a third party vehicle namely KCE 841Z subsequently causing him serious injuries.
6. The parties recorded consent on liability at 85:15% in favour of the 1st respondent.
7. The trial court's decision was thus confined to quantum on which this appeal is presented. However, in this appeal the appellant too challenges the fact that the award on liability was against the weight of evidence.

Evidence

8. The parties opted to produce all documents on record without calling the makers.

Submissions

Appellant's submissions

9. The appellant faulted the court for arriving at an award in the absence of oral testimony by the expert witnesses. In this regard, he cited the case of *Amosam Builders Developers Ltd v Betty Ngendo Gachie & 2 others* [2009] eKLR where the court held:

“There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it a long with other



evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it.”

10. The appellant also invited the court to consider the position in *Stephen Kinini Wang'ondvu v The Ark Limited* [2016] eKLR where it was held:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [11] Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”.⁷ It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.⁹

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.¹² A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]”

11. The appellant urged the court to find that the 1st respondent had failed to discharge the burden of proof with respect to the injuries sustained. He submitted that the award of kshs 800,000.00 as general damages for the injuries sustained by the 1st respondent were exorbitant and/or inordinately high and the trial court deviated from the set down principle of comparable injuries attracting comparable awards.
12. It was the appellant’s submission that in the event that the court found the 1st respondent to have sustained the injuries as averred, then the it should set aside the award of kshs 800,000.00 and substitute the same with kshs 90,000.00 as the 1st respondent suffered no fracture. The appellant invited the court to consider the authorities of *Godwin Ileri vs Franklin Gitonga* [2018] eKLR and *George Mugo &*



another v A K M (Minor suing through next friend and mother of A M K [2018] eKLR where an award of kshs 90,000.00 was made for similar injuries to those of the 1st respondent.

13. On special damages, the appellant disputed the award of kshs 17,820.00 and submitted that only kshs 7,000.00 ought to have been admitted as the excess figure did not meet the provisions of section 19(1) (a) (b) of the *Stamp Duty Act*, cap 48 Laws of Kenya. In this regard, the court was invited to consider the position as was in the case of *Eunice Auma Onyango v Salin Akinyi Oluoch* [2015] eKLR where it was held:

“29. Be that as it may, I have looked at the provisions of the *Stamp Duty Act* and I have no hesitation in finding that the trial court did not err in admitting the said receipts. Whether or not the said receipts had the probative value to amount to proof of a claim on special damages remains an absolutely different issue altogether. In fact that was the position taken by my sister Lady Justice Mary Kasango in *Leonard Nyongesa v Derick Ngula Right*, Civil Appeal No 168 of 2008 a Mombasa (unreported) when she held thus:-

“The position, therefore is that a receipt for which payment of stamp duty is required under the *Stamp Duty Act* is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the Court cannot award damages based on such a receipt.”

14. The appellant also urged the honourable court to fault the trial court for finding negligence on his part regardless of consent on liability having been recorded.

1st respondent's submissions

15. The 1st respondent urged the court to dismiss the appeal. On the issue of liability, he submitted that the same was agreed upon between parties and a consent adopted as an order of the court. It was thus his submissions that the issues for determination ought to be strictly confined to quantum as the consent was never set aside. The authority of *Dbiraj Manji v Tyson Ouma* [2021] eKLR was cited to buttress this submission.
16. On the same issue, the case of Nairobi High Court Civil Case no 2522 of 1996, *Philip Kipchirchir Murgor & 2 others v Josiah Nyawara Ogina & 2 others* [2020] eKLR, Thurania, J held as follows in respect of a situation where parties have entered into a consent;

“.....15. The recording of a consent/compromise on liability is a matter between the parties therein and the court would normally not go behind the consent/settlement by the parties to question the reasons behind the recording of the consent. It may as well be, as submitted by the respondent, that a party can choose to adopt a position detrimental to it just for the sake of entering into an amicable settlement.....” *Robert Ngondkathathi vs Francis Kivuvakitonde* [2020] eKLR, Machakos Civil APPEAL No 57/2017, Odunga J had the following to say on agreements by parties.

“.15. Parties and their legal advisers ought to take the advice of the Court of Appeal in *James Njoro Kibutiri vs Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In *Lehmann's (East Africa) Ltd vs R Lehmann & Co Ltd* [1973] EA 167 it was however, held that:



“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”

Based on the foregoing, the trial court needed not make its own finding on the issue of liability since the same had been settled by consent of parties, which settlement was recorded in court. The trial court was therefore right in adopting parties’ consent in the apportionment of liability. I will therefore not disturb the issue of liability.

17. The 1st respondent submitted that parties having agreed to produce their respective documents by consent, the trial court cannot at the appeal stage be faulted for considering the same and making its findings without the makers of the said documents being called to produce them.

18. In support of the foregoing, the 1st respondent relied on the case of [*Rebecca Adams v Francis Mutavi Kimuyu*](#) [2019] eKLR where it was held:

“32. In this case however, the learned trial magistrate himself was not amused by the procedure adopted. The learned trial magistrate therefore, and quite properly in my view, followed the path taken by the Court of Appeal in *Ali Ahmed Naji vs Lutheran World Federation (supra)* when he expressed himself as follows:

“The parties’ agreement on production of documents did not specify which documents were to be produced and which ones were not to be admitted. The court cannot therefore interfere with the parties’ agreement on production of documents.”

33. In his judgement, the learned trial magistrate made factual findings on the injuries sustained. He found that from the various documents produced, the plaintiff suffered blunt trauma to lower lumbar region with incontinence (urinary and impotence) and blunt trauma left hip. As correctly submitted by the respondent on June 14, 2013, the plaintiff filed a further list of documents which was duly served on the appellant’s advocates containing copies of the documents complained of by the appellant. It is therefore misleading for the appellant to now complain that the documents were neither filed nor served.

34. Having discounted the first ground of appeal it follows that the second ground which was, in my view, premised on the success of the first ground must similarly fail.”

19. Further, the 1st appellant urged the court to consider the position in [*Esther Chepkemoi Ngecher v John Kung’u & Charles Muthoka*](#) [2022] eKLR the same position.

20. On whether the award of kshs 800,000.00 was inordinately high, the 1st respondent submitted that the same was reasonably informed and was commensurate to the injuries sustained. He also submitted that he had pleaded and proved the special damages as awarded by the trial court. Thus, the said documents having not been objected to and were adduced by consent cannot be challenged at the appellate stage. He urged that the appeal be dismissed with costs.



Analysis and determination

21. Being the first appellate court, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No 161 of 1999) in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

22. After considering the evidence on record and the respective rival submissions, my task is to make a determination as to whether the documents produced by consent of the parties and consent on liability agreed upon by the parties should be upheld and whether the award of kshs 800,000.00 as general damages for pain and suffering was inordinately high to warrant the interference by this court having in mind that comparable injuries should attract comparable interests as was the position in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR.
23. On the first issue, this court is of the informed position that litigation is for the parties and it is upon a party to ventilate their case in a manner it considers would best bring out their case. The system being adversarial in nature, it is upon parties to settle on the best way to present and formulate their case within the confines of the procedures and rules. A similar view as was posited in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings.*” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



24. In view of the above, the parties having recorded a consent as to how the to proceed with the case which said consent was to the effect that the documents by respective parties be produced without objection, it was incumbent upon the trial magistrate to consider the same and make his findings based on the documents that were on record. The trial magistrate cannot be faulted for rightfully doing so.

25. The Court is in agreement with the position taken by the Court in *Esther Chepkemoi Ngecher v John Kung'u & Another (supra)* cited by the 1st respondent where the court held:

“ 17. I have read the evidence on record. The appellant was duly represented by counsel as well as the respondents. At no one time did the advocate for the respondent’s object to the production of all the exhibits adduced by the appellant, including the medical report. The respondents’ advocate consented in court the production of the said exhibits by the appellant before closing the defense’s case without calling any witness to the stand. It is therefore find that their consensus by the advocates on the production of the documents including the appellant’s documents which were produced by PW1 who was not the maker.

18. In view of the evidence on record and the above cited authorities i hold that the said medical records were properly produced and rightfully admitted in evidence. On the same vein this court finds that the trial magistrate erred in law by failing to award quantum on the ground that no medical report was produced in court.”

26. The above position applies to the consent entered into with respect to apportionment of liability. I need not say more.

27. It is crucial to note that in order for the appellate court to interfere with the award of the trial court, there has to be sufficient grounds and principles as was held in *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470) that:

“ Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.”

28. I also stand guided by the principles on interfering with judicial discretion as laid down in the case of *Price and Another v Hilder* [1996] KLR 95 that:

“ In considering the exercise of judicial discretion, as to whether or not to set aside a judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”



29. Further, in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J A 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 proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

30. I have considered the rival submissions by parties, the evidence on record and the authorities cited by both counsel and appreciate that injuries will never be fully comparable to the other person’s injuries. What a court is to consider is that as far as possible the injuries should be comparable to the other person’s injuries, and the after effects.

31. I have reviewed the two medical reports by the experts for the appellant and the 1st respondent. The degree of injury is indicated as “harm” by both medical reports. The injuries sustained are established to be multiple wounds on the face, right upper limb and ankle dislocation. Thus, the appellant having sustained soft tissue injuries and a dislocation, the following cases are a good guide:

- i. In the case of *Veronicah Mkanjala Mnyapara v Charles Kinanga Babu* [2020] eKLR the respondent sustained deep cut wound on the forehead, chest contusion, bruises on the face, bruises on both hands, bruises on both ankle joints, dislocations of the left wrist joint and the left ankle joint, and an award of kshs 300,000.00 for general damages was affirmed.
- ii. In the case of *Richard Gituku Gakinya v Anthony Kibiri Waithaka* [2021] eKLR the respondent sustained deep cut wound on the right supra – orbital region, right ankle joint dislocation and soft tissue injuries, and the Court substituted an award of Kshs. 400,000.00 with kshs 300,000.00.

32. In view of the above cited authorities which are comparable with the injuries the 1st respondent suffered, I find an award of kshs 330,000.00 for pain and suffering to be adequate compensation, more so having regard that the injuries had healed with no permanent deformity and the current inflationary trends.

33. On the issue of special damages, the 1st respondent presented a receipt of kshs 7,000.00 for preparation of the medical report, receipts from Kayole Hospital Limited in the sum of kshs 4,800.00, receipts from Naivasha County Referral Hospital in the sum of kshs 3,770.00 and two receipts for motor vehicle copy of records in the sum of kshs 1,100.00. They are in the sum of kshs 16,670.00. as is settled law that special damages must be specifically pleaded and proved, the trial court was only obligated to award the sum proved.



Disposition

34. In conclusion, I find that the appeal partially succeeds on the limbs of general and special damages. The appeal fails on the limb of liability. In the premises, the appeal is allowed as hereunder:

i. The award of kshs 800,000.00 for general damages is substituted with kshs 330,000.00.

ii. The award on specials is substituted with kshs 16,670.00.

Sub-total = ksh 346,670.00

Less 15% contributory negligence of Ksh 52,000.50

iii. Net payable= kshs 294,669.50

35. Each party to bear their own costs of the appeal.

36. It is hereby so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 29TH DAY OF JULY, 2022.

.....

G W NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms Mukami for the appellant.

2. Ms Kiberenge for the respondent.

