Patel v Mose & another (Civil Appeal 45 of 2019)
[2022] KEHC 11109 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 45 OF 2019

GWN MACHARIA, J

JULY 29, 2022

BETWEEN

MAINESHKUMAR KENTILALA PATEL ..... APPELLANT

AND

AUGUSTUS MANOTI MOSE ..... 1ST RESPONDENT

REUBEN ONDIEKI OPINI ..... 2ND RESPONDENT

((Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha CMCC No. 411 of 2016 delivered by Hon. K. Bidali, CM on the 18th day of September, 2019).)

JUDGMENT

The Appeal

1. The instant appeal is with respect to the judgment by Hon K.Bidal (CM) delivered on September 18, 2019 in CMCC No 411 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 700,000.00
    c Special Damages Kshs 9,250.00
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 Honourable Court to reverse the judgment on liability and reassess the awards.
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 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 his agents the same was recklessly and negligently controlled along Narok Mai-Mahiu Road that it collided with a third-party vehicle registration No 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. However, in this appeal, the Appellant too challenges the fact that the award on liability was against the weight of evidence. I thus duplicate the grounds of appeal raised as under:

    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.

Evidence

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

Submissions

Appellant's submissions

9. The Appellant faulted the Honourable Court for arriving at an award in the absence of oral testimony by the expert witnesses. 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'ondu 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.
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> 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.
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> 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]
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> 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.
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> 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.
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> 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 700,000.00 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 submissions that in the event the Court found the 1st Respondent to have sustained the injuries as averred, then the Court should set aside the award of Kshs 700,000.00 and substitute the same with Kshs 90,000.00. The Appellant invited the Court to consider the authorities *Fast Choice Company Ltd & Another v Joseph Wanyiri Mwangi* [2011] eKLR where the court made an award of Kshs 150,000.00 for soft tissue injuries to the head, chest, left thigh &wrist and upper gum, broken left incisor jaw, loose incisor teeth upper jaw and *Kiwanjani Hardware Ltd & Another v*

Nicholas Mule Mutinda [2008] eKLR where an award of Kshs 50,000.00 was upheld for blunt injury to the head without loss of consciousness, blunt injury to the neck, a cut to the throat, blunt injury to the left shoulder and back, blunt injury to the chest, blunt injury to the right forearm, deep penetrating would on the left leg with cuts and bruises on the same leg.

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 rest 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 as referred to 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:-
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> > "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 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 Honourable Court to dismiss the Appeal. On the issue of liability, the 1st Respondent submitted that the same was agreed between parties and a consent adopted as an order of the court. It was thus the submission of the 1st Respondent that the issues for determination ought to be strictly confined to quantum as the consent was never set aside. The authority of *Dhiraj Manji v Tyson Ouma* [2021] eKLR was cited to buttress this position.

16. On this again, in 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, Thuranira, 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 Ngondekathathi vs Francis Kivuvakitonde [202O] eKLR, Machakos Civil APPEAL No 57/2017, Odunga J. had the following to say on agreements by parties.
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> ".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 the 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:
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> > "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."
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> > 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 14th June 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.
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> > 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 Respondent urged the Court to consider the position in *Esther Chepkemoi Ngecher v John Kung'u & Charles Muthoka* [2022] eKLR to buttress the position.

20. On whether the award of Kshs 700,000.00 was inordinately high, the 1st Respondent submitted that the same was reasonably informed and was commensurate to the injuries sustained. He submitted that it had pleaded and proved the special damages as awarded by the Trial Court. The said documents

having not been objected to and 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 and the respective rival submissions, my task is making 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 awards of Kshs. 700,000.00 as general damages for pain and suffering was inordinately high to warrant the interference by the 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 I*ndependent 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 Railwasys 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....
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> 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.
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> 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 an 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 stand guided as well by the principles on interfering with judicial discretion as laid down in the case of *Price and Another v Hilder* [1996] KLR 95 which laid down the following guidelines 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:
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> > '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 the parties, the evidence on record and the authorities cited by both counsel and appreciate that injuries will never be fully comparable to 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. The Court has reanalyzed the evidence on record and noted that the Appellant filed no medical document(s) upon re-examination of the 1st Respondent. The said report was to be later filed alongside the submissions of the Appellant at the trial stage which was a pointer to non-compliance of adducing a document during adduction of evidence. The Trial Magistrate duly noted the absence of the report at paragraph 4 of his judgment.

32. Thus, the medical report by Dr. Omuyoma dated the 21st day of March, 2016 adduced on behalf of the 1st Respondent stood unchallenged. In his findings, he assessed the nature of injuries to be grevious harm. He noted that the 1st Respondent sustained deep cut wound on the occipital region of the scalp & mandibular region, had three loose lower teeth, blunt injury to the neck & chest and soft tissue injuries on both knee and wrist joints.

33. The P3 Form filed on the 18th day of February, 2016 produced by the 1st Respondent classified the injuries as "grievous harm".

34. The foregoing findings of the medical documents were uncontroverted by the Appellant.

35. The 1st Respondent having sustained multiple soft tissue injuries and loosening of three lower teeth, the authorities cited by the Appellant are over a decade old and do not take into account the contemporary value of the shilling and inflation rates. I have therefore considered the following cases as a good guide:

    i. In the case of *Matunda (Fruits) Bus Services Ltd v Agnes Chemngeno Tuiya* [2021] eKLR the Respondent sustained deep cut wound on the scalp, cut wound on the right temporal region of the scalp, deep cut wound on the right shin, blunt injuries to the neck, loose two upper incisor teeth, loose two lower incisor teeth and cut wound on the lower lip and an award of Kshs 390,000.00 for general damages was substituted with Kshs 250,000.00

ii. In the case of *Justine Nyamweya Ochoki & another v Prudence Anna Mwambu* [2020] eKLR the Respondent suffered loss of upper front incisor tooth, deep cut on the chin, cut on the lip, loosing of the upper teeth, injury to the right forearm and loss of consciousness, and the Court substituted an award of Kshs 650,000.00 with Kshs 300,000.00.

36. It is undoubted that the 1st Respondent suffered soft tissue injuries. In my considered view, the award of Kshs. 320,000.00 for pain and suffering is commensurate to the injuries suffered, more so having regard to the fact that the injuries had healed with no permanent deformity.

37. As for special damages, the amount pleaded and proved was Ksh 9250/ and I have no reason to disturb the figure.

Disposition

38. In conclusion, I find that the appeal partially succeeds on the limbs of general damages 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 700,000.00 for general damages is substituted with Kshs 320,000.00.

ii. Special damages---------- Ksh 9250/=

iii. Sub-total ---------- Ksh 329,250.00

Less 15% contributory negligence of Ksh 48,387.50

iv. Net payable = Ksh 280,862.50

v. Each party to bear its own costs of the appeal.

39. It is hereby so ordered.

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

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G W NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms Mukami for the Appellant.

2. Ms Kiberenge for the Respondent