



**Langat v Drifters Adventure Travel Limited & another (Civil Appeal
179 of 2012) [2022] KEHC 13491 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 179 OF 2012
TM MATHEKA, J
SEPTEMBER 20, 2022**

BETWEEN

DENIS KIPKURUI LANGAT APPELLANT

AND

DRIFTERS ADVENTURE TRAVEL LIMITED 1ST RESPONDENT

NOAH'S ARK TOURS & TRAVELERS 2ND RESPONDENT

*(Being an Appeal against the judgment /decree of the Honorable P.Mayova, Resident
Magistrate in Nakuru SPMCC 1326 OF 2007 delivered on 13th September, 2012)*

JUDGMENT

1. This appeal arises from suit filed by the appellant seeking damages from the respondents for the injuries he sustained from an accident which occurred on the July 9, 2007 along Mau-Narok/Njoro road involving motor vehicle registration number xxxx and xxxx.
2. The plaintiff/Appellant averred that on the material date he was lawfully traveling in Motor Vehicle Registration Number xxxx when the 2nd defendant/Respondent by itself, servant, agent and/or employee negligently drove Motor Vehicle Registration number xxxx as a result of which it violently knocked Motor Vehicle Registration Number xxxx and subsequently caused him serious injuries.
3. The particulars of negligence pleaded against the driver of the motor vehicle Registration number xxxx were that he drove the said motor vehicle while it was defective in excessive speed in the circumstances, drove without due care and attention of other road users, failed to slow down ,swerve or in any way maintain the said motor vehicle so as to avert the accident, failed to apply brakes on time to avoid the accident, failed to ascertain that the road ahead was clear before proceeding on and Res Ipsa Loquitur.



4. That by reason of the accident, he was seriously injured, soft tissue injuries of the neck, right shoulder, arm, leg, knee and thigh, and suffered loss and damage. He sought General & special damages plus costs of the suit and interest.
5. The 1st Respondent/Defendant denied the Appellant's claim through its statement of defence dated October 18, 2007. It averred that the Appellant's claim raised no cause of action against it and that it was not the owner of the Motor Vehicle Registration Number xxxx as at the time of the accident and precisely on May 19, 2007 the same had been sold to one Alex Murisia Abesi. The 1st respondent further denied being the co-owner of the said motor vehicle.
6. It was the 1st Respondent's prayer that the Appellant's claim against it be dismissed with costs.
7. The 2nd Respondent never entered appearance nor filed any defence.
8. On June 7, 2012, the matter was heard. On this day the Respondents were not present and the matter proceeded ex parte.
9. The plaintiff/appellant testified that on July 9, 2007 at 4.00pm he was traveling from Likia to Nakuru in a motor vehicle Registration Number xxxx. When they reached Egerton Area they stopped to pick passengers by the roadside. While stationary a mv registration number xxxx appeared from the front. It lost control and hit their Motor Vehicle. As a result he sustained injuries on the neck, right shoulder, right hand and right leg. He was rushed to PGH Nakuru where he was admitted for three days. He produced the Discharge Summary from PGH Hospital as exhibit 1. He reported the accident to the police station and was issued with a P3 Form and police Abstract which he produced as Exhibits 2 and 3 respectively. He stated that he was later examined by Dr Omuyoma. He produced the medical report and the receipt thereof as exhibits 4 and 5 respectively. It was his testimony that he had not fully recovered and he still experienced pains on the neck and hand. He blamed the driver of Motor Vehicle Registration Number xxxx for hitting the Motor Vehicle in which he was traveling while parked on the roadside.
10. The trial court vide its Judgment delivered on September 13, 2012 dismissed the Plaintiff/Appellant's case with costs to the Respondents. The reasons for dismissal were that whilst the police abstract indicated that the mv belonged to the 2nd defendant/ respondent, the plaintiff appellant had not served them with the pleadings ; that there was no evidence that the 1st defendant respondent was the registered owner of mv registration no xxxx . for those reasons the court could not make a finding on liability against them.
11. The appellant aggrieved by the judgment and finding filed this appeal, on 6 grounds as set out hereunder:-That the learned trial magistrate erred in law and in fact
 1. In dismissing the suit in total disregard of the evidence adduced in support of the Appellant's case.
 2. In finding that the Appellant had not proved ownership.
 3. In dismissing the suit in total disregard of the fact that the defendants did not call any witnesses.
 4. In holding that the Appellant had not proved his case on a balance of probability contrary to the evidence on record.
 5. In showing open bias and imported his own evidence which influenced him to dismiss the Appellant's suit.
 6. In failing to assess the damages payable to the Appellant.



The Appellant thus prayed for orders that.

1. The Appeal herein be allowed and the judgment/decree of Honorable P Mayova Resident Magistrate delivered on September 13, 2012 against the Appellant be set aside.
 2. Judgment be entered in favor of the Appellant against the Respondents.
 3. This Honourable Court do proceed to assess damages due to the Appellant.
 4. The respondents do bear costs of this Appeal
 5. Any other relief this Honorable Court may deem fit to grant.
12. The matter proceeded by way of written submissions. There none from the respondents
13. This being a first appeal the court is bound to review the evidence afresh and draw its own conclusion keeping in mind it never saw nor heard the parties.

Appellant's Submissions

14. In submissions dated June 27, 2016 and filed on July 1, 2016, the appellant submitted that the issues for determination in the Appeal are:-
1. Whether the Appellant proved his case
 2. Whether the Appellant proved ownership of the subject Motor Vehicle
 3. Whether the trial Magistrate placed reliance on extraneous issues.
 4. Whether the trail magistrate ought to have assessed damages.
15. On the first issue, the appellant submitted that his case was uncontroverted and that he produced sufficient evidence and proved his case on a balance of probabilities.
16. He placed Reliance on the following cases:-
1. *Karuru Munyororo vs Joseph Ndumia Murage & another Nyeri HCCC No 95 of 1998* as relied in *Linus Kiongo & 3 others vs Town Council of Kikuyu [2012]eKLR* where it was held :

' The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of defendants and their counsel to cross examine her on her evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.'
 2. *Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu [2012]eKLR* citing the decision in *Edward Muriga through Stanley Murigau Nathaniel D schulter Civil Appeal No 23 of 1997* where it was stated :

' In the matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.'



3. J GV Odunga in *Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu* [2012]eKLR observed as follows:
- ' The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil case is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.'
17. On the second issue, the Appellant submitted that he produced a police Abstract as Exhibit 3 in which the material motor vehicles were indicated, the owners and their insurers which exhibit was sufficient proof of ownership. To buttress this position he cited two cases. Namely;
1. *Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & another CA No 260 of 2004* (Kisumu)(2010)eKLR as relied on in *Superform Ltd vs Gladys Nchororo Mberu [2014]eKLR* where the court held:

' Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases.'
 2. *Samwel Mukunya Kamunge vs John Mwangi Kamur, civil Appeal no 34 of 2002*, the court observed as follows:

' I find that the trial magistrate was wrong in holding that only a certificate of search from the registrar of motor vehicle could prove ownership of the motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of motor vehicle xxxx, and evidence having been adduced that letters of demand sent to the respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle xxxx was owned by the Respondent.'
18. On the third issue, the Appellants submitted that he proved his case in accordance with Section 107 and 108 of the *Evidence Act* on balance of probabilities against the Respondent and it was therefore unlawful for the court to hold in favour of the respondents despite their failure to prove their facts.
19. On the last issue, it was the Appellant's submissions that the learned magistrate had a responsibility to assess damages even after dismissing a suit but he failed to do so. In support of this proposition the Appellant cited the case of *Jeredi Ukilu Osango vs Geowave Ship Contractors Limited [2014]eKLR* , where the court relied on the case of *Gladys Wanjiru Njaramba vs Globe pharmacy & another [2014] eKLR* where it was stated it is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit and that this position is confirmed by the Court of Appeal in the case of *Mordekai Mwangi Nandwa vs Bhogals Garage Ltd CA No 124 of 1993 report in [1993]KLR 4448* .
20. On quantum, the appellant submitted that an award of Kshs 200, 000/= would suffice as General Damages. In support of this position the Appellant he relied on the following cases;
1. *Micah Lekeuwan vs Julius Amakoye Yosi HCCA No 127 of 2002* Mombasa where the court awarded Kshs 150,000/= as general damages for soft tissue injuries.



2. [*Channan Agricultural Contractors Ltd vs Fred Barasa Mutayi Civil Appeal No 29 of 2012*](#) where the Court awarded Kshs 150, 000/= to the Respondent who had sustained Blunt Injury to the Chest, Cut Wounds to the head and left leg.
 3. [*Joseph Njoroge Kariuki vs Dennis Kiatu Malombe Civil Appeal No 59 of 2009*](#) where the court awarded Kshs 150, 000/= to the Respondent who had sustained Blunt injuries to the neck, chest, back and the right knee.
21. The appellant also prayed for an award of Kshs 4600/= as special damages for ground that these amount were specifically pleaded and strictly proven.
 22. On costs the appellant relied on the Provisions of Section 27 of the [*Civil Procedure Act*](#) and urged this court to award him costs.

Issues for Determination

23. The issues that arise for determination in this Appeal are:-
 1. Whether the Appellant served the 2nd Respondent with suit documents before the Lower Court.
 2. Whether the Appellant proved the ownership of the Motor Vehicle Registration No xxxx
 3. Whether the trial court ought to have quantified the damages.

ANALYSIS

ISSUE No.1- Whether the Appellant served the 2nd Respondent with suit documents before the Lower Court

14. Order 5 Rule (5) of the [*Civil Procedure Rules*](#) provides that which enact that:

' Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with Subrule (2) of this Rule '
15. Further, Order 5 Rule (1) (7) of the Civil Procedure Rules enacts that:

' When no application has been made under Subrule (2) the court may without notice dismiss the suit at the expiry of 24 months from the date of issue of the original summons.'
24. It is the Responsibility of the Plaintiff to extract summons and serve upon all parties he has sued in a matter. The Appellant on July 6, 2015 duly extracted summons but there is no evidence that the same was served upon the 2nd Respondent in compliance with the above cited order. It is imperative to note that the Appellant has not demonstrated in this Appeal that he had duly served the 2nd Respondent.
25. There are no Affidavits of service on record to show that the Appellant duly served the 2nd respondent with the hearing notices. It is rules of natural justice that a party should not be condemned unheard and it is my opinion therefore that the trial court was right in dismissing the suit against the 2nd Respondent for want of service.



**ISSUE No 2- Whether the Appellant proved the ownership of the Motor Vehicle Registration No
xxxx**

26. The appellant submitted that the police abstract that he produced showed the owners of the Motor Vehicles that were involved in the accident.
27. It is indeed true that the evidence of police abstract suffices when the same is not controverted by the Respondents. The court in In respect to evidentiary value of a police abstract as regards proof of ownership of a motor vehicle, in the case of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) eKLR the Court of Appeal held as follows:-

' Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary'

28. The police abstract clearly indicates that the owner of xxxx is Noah's Ark Tours & Travels and xxxxx as Mr George Kenneth Ndungu. There is no mention of the 1st defendant/respondent in the plaint dated September 28, 2007.
29. The 1st defendant/respondent in its defence denied ownership of the m/vehicle. The appellant produced the police abstract but the said document does not in any way established that the either of the respondents is the owner of the said motor vehicle.
30. Evidently without proof of ownership of the motor vehicles the court could not have proceeded to make a finding on liability.

Issue No 3- Whether the trial court ought to have quantified the damages.

31. The appellant argued that the trial magistrate erred in failing to quantify the award of general damages he would have been awarded had he been successful in the lower court case.
32. It is now trite law that a trial court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa V Bhogals Garage Ltd CA No 124 of 1993 reported in [1993] KLR 448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment. Similarly, in the case of *Matiya Byabaloma & Others V Uganda Transport Co Ltd Uganda Supreme Court Civil Appeal No 10 of 1993 IV KALR 138* where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim'.
33. Guided by the above authorities it is clear the trial court erred by not assessing the award of general damages he would have awarded to the appellant had he been successful in proving his Case.
34. The Appellant submitted that an award of Kshs 200, 000/= would suffice as general damages and relied on Micah Lekeuwan vs Julius Amakoye Yosi Hcca No 127 of 2002 Mombasa, Channan Agricultural Contractors Ltd vs Fred Barasa Mutayi Civil Appeal No 29 of 2012 & Joseph Njoroge Kariuki vs Dennis Kiatu Malombe Civil Appeal No 59 of 2009 above.



35. An amount of Kshs 150 000 would have sufficed as general damages for pain and suffering.
36. On special damages the Appellant/plaintiff pleaded for Kshs 4600 being the cost of the Medical report and produced the receipt. There was no receipt produced to show he paid Kshs 1000/= for P3 Form. He also claimed Ksh 100/= for Police Abstract and 500/= Motor Vehicle Search certificate No receipts were produced for the same. The Appellant therefore is entitled to Kshs 3100/= as special damages.
37. Having said that, I find that the appeal has no merit. The same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 20TH SEPTEMBER, 2022.

MUMBUA T. MATHEKA

JUDGE

CA Edna

For the Appellant

Gekonga & Company

Advocates

Nakuru.

For the 2nd Respondent

Alphose Mutinda & Co Advocates

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Nairobi.

