Kieti v Jumbo Foam Mattresses Industries (Civil Appeal E047 of 2020)
[2022] KEHC 14325 (KLR) (24 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14325 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E047 OF 2020

MW MUIGAI, J

OCTOBER 24, 2022

BETWEEN

RAPHAEL KIETI ALIAS MARTIN KIETI NDOLO ..... APPELLANT

AND

JUMBO FOAM MATTRESSES INDUSTRIES ..... RESPONDENT

(Being an Appeal from the Judgment by the Hon. B. Kasavuli Principal Magistrate Mavoko in Civil case No. 1064 of 2016 delivered on 10.12.2020)

JUDGMENT

Amended Plaint Filed On July 5, 2019

1. The appellant instituted a suit against the respondent seeking general damages, special damages of Kshs 3,700/-, costs of suit and interest, the cause of action being that on/or about August 18, 2016, the appellant was a lawful passenger in motor vehicle Reg No KAP 532Y Toyota Corolla along Nairobi-Mombasa Road near Jumbo quality when motor vehicle registration number KBU 415F Mistubishi lorry owned by the respondent was negligently, recklessly and/or carelessly driven by the respondent's driver, employee, servant and/or agent at high speed without any due care or attention causing it to ram onto motor vehicle Reg No KAP 532Y.

2. The appellant has pleaded that he suffered the following injuries; bruises on the right knee and further averred the particulars of the injuries were to be furnished at the hearing by way of medical report.

Defence Filed On February 10, 2017

3. The respondent denied each and every allegations contained in the plaint save for the description of parties and the jurisdiction of the trial court. The respondent averred that it would join the driver/ owner of motor vehicle registration number KAP 532Y as a 3rd party in the proceedings.

Viva Voce Evidence

4. On August 22, 2019, Mr Githua, counsel for the respondent stated that he was ready to proceed with the hearing but he would not be calling any witness.

5. PW1, 88387 PC Ibrahim Kyemboi based in Athi River police station stated that the appellant was involved in an accident on August 18, 2016 along Mombasa Road at Jumbo Quality Products as a passenger. He produced the police abstract as Pex-1.

6. In his testimony, the appellant (PW2) stated that on August 18, 2016 he sustained an injury on his right leg while on board motor vehicle registration number KAP 532Y. He stated that he was treated at Shalom Hospital and on the following day, he went to Airport Kitengela where X-ray was carried out. He stated that he went to Athi River Medical. He adopted his witness statement dated September 30, 2016.

7. The appellant produced an attendance card from Shalom Hospital as Pex 2(a), request Form Mlolongo imaging centre as Pex 2(b) and treatment notes from Athi River Health as Pex 2(c).He marked the medical report of Dr Mwende as MF1-3(a) and a receipt of Kshs 3, 000/- as MF1-3(b). The P3 Form as Pex-4 and a copy of records as Pex-5. The appellant blamed the respondent's driver for not following the traffic rules and crossing on the wrong lane. He prayed for compensation of the injury ad costs of the suit.

8. In cross-examination by Mr Githua, the appellant stated that he was injured on the right leg but when X-ray was done, it was discovered that he had a back and elbow injury. He stated that he got injured on the knee. According to the appellant he visited hospital that day where he was given medicines and attendance card. He stated that on August 20, 2016 he went to hospital with back problem. According to the appellant, he reported to the police station on August 19, 2016. He stated that he visited the doctor after two weeks and the injury had worsened.

9. In re-examination by Ms Naswa, the appellant stated that the medical report indicate that the injury was 2 days old. He stated that their motor vehicle was hit on the side and not head on collision.

10. PW3, Titus Ndeti, the doctor produced his medical report as Pex 3(a). He stated that he relied on client's history, physical exam and treatment notes from Shalom Hospital, P3 form and medical report by Dr Mwende. According to the doctor, he charged Kshs 3,000 to prepare the report and Kshs 10, 000/- as attendance charges which he produced as Pexh 3(b) and Pexh-3(c).

11. In cross-examination, the doctor stated that he relied on the documents presented by the plaintiff and his history. He stated that the injuries had healed.

Trial Court's Ruling Delivered On December 10, 2020

12. The trial court held the respondent 100% liable for the accident.

13. On quantum, the trial magistrate held that the hospital documents did not show what injuries the appellant was treated if any hence the appellant had failed to establish any nexus between the pleaded injury and the accident. The trial magistrate held that had the appellant proved his injuries, he would have awarded the appellant Kshs 50, 000/- as general damages for bruises on the right knee which had completely healed.

Memorandum Of Appeal Filed On December 24, 2020

14. Aggrieved by the trial court holding on quantum, the appellant has appealed to this court citing the following grounds of appeal:-

    (1) Thatthe learned magistrate erred in law and in fact by deciding the case without considering all the evidence on record.

    (2) Thatthe learned magistrate erred in law and in fact by holding that the appellant had not proved the injuries that he sustained.

    (3) Thatthe learned magistrate erred in law and in fact by failing to take into consideration the medical evidence adduced on behalf of the appellant.

    (4) Thatthe learned magistrate erred in law and fact by challenging the medical evidence before court without any evidence to the contrary.

    (5) Thatthe learned magistrate erred in law and in fact in dismissing the suit without determining the real issues in dispute.

    (6) Thatthe learned magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on quantum.

    (7) Thatthe whole judgment on quantum was against the weight of evidence before the court.

15. The appellant pray for setting aside of the trial court assessment of damages.

Appellant's Submissions Filed On May 11, 2022

16. It has been submitted that the trial magistrate failed to take into consideration the medical evidence adduced by the appellant. According to the appellant, despite lack of initial treatment notes, the trial magistrate admitted that there was a treatment card on record as well as receipts from Shalom Community Hospital issued on August 18, 2016. It has been submitted that there was also a P3 Form on record. Further that Dr Ndeti produced his medical report in support of the appellant's case. Reliance was placed on the cases of *Erick Juma & 2 others v Fredrick Gacheru & another* (2016) eKLR, *Mwanzani Mwakitu v Chandaria Industries Co Ltd* Nrb HCCA No 156 of 2007(2015) eKLR, *Upan Wasana (EPZ) v Zipporah Wangui Mbuchi*(2010)eKLR and the case of James Mburu Njoki v Richard Kipkorir Langat(2020)eKLR where the courts rejected the argument that without treatment notes one cannot prove involvement in an accident or injury and their absence is not fatal to the case but useful to show the extent of the plaintiff's injuries.

17. The appellant has urged the court to find his appeal has merit and allow the appeal with costs.

Respondents Submissions Filed On July 4, 2022

18. On behalf of the respondents, it has been submitted that that appellant's allegations are misconceived and without basis. According to respondent, the appellant's injuries were hinged on an unsigned Cervical Spine X-Ray Report from Mlolongo Imaging Center, Dr Titus Ndeti's medical report dated July 1, 2020 and a card from Athi River Shalom Community Hospital. It has been submitted that the trial magistrate properly evaluated the evidence to arrive at a conclusion that there was no nexus between the pleaded injury and the accident hence there is no need for this court to interfere with the trial court judgment.

19. According to the respondent, the trial magistrate did consider the appellant's submissions and authorities on quantum as the trial magistrate stated in his judgment that he had [I have] read the useful submissions on record by both parties'.

20. According to the respondent, the appeal should be dismissed on the basis that;

    a. While the appellant alleges that he visited Athi River Shalom Hospital and Airport Medical Services, he did not produce any single treatment note before the trial court

    b. The plaintiff failed to establish any nexus between the pleaded injury and the accident in issue.

    c. The learned magistrate considered the submissions by both parties on quantum.

Respondent's Further Submissions Filed On July 18, 2022

21. It is further submitted that the appellant has sneaked into the record of appeal the receipts from Airport Medical Centre dated August 19, 2016 and Athi River Shalom Community Hospital dated August 18, 2016. According to the respondent, the act is irregular and unprocedural and tantamount to abuse of process of court. The respondent has urged the court to strike out the receipts.

22. It has been submitted that the card does not have a date or any injuries alleged by the appellant. According to the respondent, the receipts introduced irregularly do not show the injuries the appellant was treated if any. The respondent has attacked Dr Ndeti's report on the basis that it was prepared 4 years later after the accident and that the doctor relied on treatment notes that were not produced by the appellant or the doctor.

23. Regarding the P3 form contained in page 13 of the record of appeal, it has been submitted that under part ii section A, clause 3 the medical officer after conducting general physical examination on the appellant noted that the appellant was 'sober' hence a clear indication that the medical officer did not find the alleged injuries by the appellant. The respondent contends that the P3 form is date August 19, 2016 hence the appellant's alleged injuries could not have healed within just one day since the accident occurred on August 18, 2016. According to the respondent, under part ii, section B, clause 3, the approximate age of injuries was indicated to be 18 days after the injury hence there is no nexus between the 18 days old injuries, the date of the P3 form and the date of the alleged injuries. It has been submitted that the P3 form is suspicious hence of no use to prove the appellant's injuries.

24. The respondent has urged the court to dismiss the appeal with costs.

Determination

25. The court has considered the record of appeal, grounds of appeal, submission filed and authorities relied upon by parties.

26. This being first appellate court, it was held by the Court of Appeal in *Selle v Associated Motor Boat Co* [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

27. It was held by the Court of Appeal in *Ephantus Mwangi & another v Duncan Mwangi*, civil appeal No 77 of 1982 [1982-1988] 1KAR 278 that:

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that
>
> (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or
>
> (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. The appellant's appeal is premised on ground that the trial magistrate erred in law and in fact to hold that the appellant had not proved his injuries yet there was no contrary evidence placed before trial court against his medical evidence. The appellant asserted that the trial magistrate failed to consider his submissions and authorities in making a finding on quantum.

29. The court's view is that the issues that fall for determination are;

a. Whether the appellant proved his injuries on a balance of probabilities and if so, whether the award of Kshs 50, 000/- assessed by the trial magistrate should be upheld?

b. Whether to strike out the receipts contained in page 19 of the record of appeal?

Whether The Appellant Proved His Injuries On A Balance Of Probability

30. According to the trial magistrate, the card from Athi River Shalom Community Hospital did not show the injuries sustained by the appellant as well as the other medical documents on record. The trial magistrate was more convinced by the court decisions relied upon by the respondent to arrive at an inevitable conclusion that the appellant had failed to establish any nexus between the pleaded injury and the accident.

31. The appellant contends that the P3 form and Dr Ndeti's medical report proved that he sustained injuries as a result of the accident. The court notes that the respondent has not disputed the occurrence of the accident as alleged by the appellant. The occurrence was confirmed by the police officer who produced a police abstract.

32. The appellant's legal burden of proof is well enunciated by section 107 (1) of the *Evidence Act*, cap 80 where it is provided that;

> Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

33. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the *Evidence Act*, chapter 80 Laws of Kenya..."

34. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR held that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

35. Where the plaintiff has discharged the legal burden of proof, the burden may shift to the defendant depending on the circumstances of the case. This is what in law we refer to as the evidential burden of proof well captured under sections 109 and 112 of the *Evidence Act*. See *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334 and *Evans Nyakwana v Cleophas Bwana Ongaro* (supra).

36. If the burden shifts to the defendant who does not adduce evidence to counter the plaintiff's allegations, the plaintiff's allegations remain uncontroverted. In the case of *Karuru Munyororo v Joseph Ndumia Murage & another* Nyeri HCCC No 95 of 1988, Makhandia, J (as he then was) held that:

> "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the 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."

37. What amounts to on a balance of probability was held by Kimaru, J(as he then was) in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 stated that:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

38. In this case, the court is convinced that the appellant on a balance of probability proved his injuries. In the amended plaint at paragraph 6, the appellant did particularize the injuries as bruises on the right knee and averred that further particulars were to be furnished by way of a medical report in the hearing. Based on the Pex-1, the police abstract dated September 5, 2016, PW1 stated that the appellant was a passenger involved in the accident on August 18, 2016. The police abstract show the nature of injury as 'harm'. PW2, the appellant herein stated that on August 18, 2016, he was a passenger in motor vehicle KAP 532Y which was involved in an accident with motor vehicle KBU 514F. It is therefore not in dispute that the appellant sustained injuries on August 18, 2016 while in motor vehicle KAP 532Y. The trial magistrate's finding that the respondent's motor vehicle KBU 415F was to blame for the accident is not in contest.

39. Based on the medical documents produced as exhibits by the appellant, the court's view is that the trial magistrate did err to find that the documents did not prove injuries. The appellant testified in court on the injuries unlike the respondent whose case was closed without testimony of its driver. The court notes that the appellant's evidence was not controverted even in cross-examination. The appellant gave

sufficient particulars of injuries as he had pleaded in his plaint that further particulars would be given in the hearing.

40. The appellant's evidence was buttressed by PW3 evidence and the medical reports which were produced as exhibits. It is not true that treatment notes from Athi River Shalom Hospital were not produced as exhibits as the court notes at page 107 line 10 of the record of appeal, the appellant produced them as Pex-2(c). Under part ii section B, clause 4 of the P3 form, it is indicated that the appellant had received treatment at Shalom Hospital on August 18, 2016and later reviewed on September 5, 2016. The court's view is that despite the P3 form indicating that the approximate age of the injuries were 18 days old after the injury, the respondent did not demand for the maker of the P3 form to come to court for cross-examination. the court finds no such ground was submitted before the trial court. The court has keenly perused the P3 form and finds no such facts as submitted by the respondent that under part ii, section A, clause 3, the medical officer found that the appellant was 'sober'. The court finds that the P3 form has sufficient details to prove the appellant's injury.

41. Even if the treatment notes were missing, there was sufficient evidence both oral and documentary to find injury was proved In the case of *James Mburu Njoki v Richard Kipkorir Langat* [2020] eKLR where Mwongo J. stated that;

> 25. It is clear 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..."
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> 26. In *Amalgamated Sawmills Limited v Joseph Njoroge Matheri* [2010] eKLR Emukule J pointed out that there may be circumstances when a treatment card need not be produced, and its absence would not be fatal:
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> "Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a doctor's report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim."

42. Majanja J. in *Erick Juma & 2 others v Fredrick Gacheru & another* [2016] eKLR opined;

> " It is true that treatment notes are part of the evidence of the involvement in the accident and injury. I however reject the argument that without treatment notes one cannot prove involvement in an accident or injury. The duty of the court is to examine the entire evidence and make a finding whether the facts alleged are proved on the balance of probabilities. The existence of treatment notes would assist establishing consistency and corroborating the other evidence but are not necessarily decisive."

43. The court finds that the trial magistrate erred not to find that the appellant had proved his injuries. The appellant's evidence remain uncontroverted to date.

44. It is trite that the injured party must prove the causal link between someone's negligence and his/her injury(s) as the Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 has held that:

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

45. Having found that the appellant proved his injuries and the issue of liability is not in contest, the respondent is therefore held liable for the injury sustained by the appellant in the accident. The court finds merit on this ground of appeal. The trial magistrate's finding that the injury was not proved by the appellant is set aside with a finding that the appellant's injury was proved as particularized in the plaint and proved by medical card from Shalom Hospital and P3 form produced in the trial court as exhibits.

Quantum of Damages

46. The Court of Appeal in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR held:

> " 10. As a general principle, assessment of damages lies in the discretion of the trial court and 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. The court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.."

47. In *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

48. The court notes that the appellant did not contest the reasonableness of Kshs50, 000/- as damages for injury sustained as assessed general damages. The court has no basis to interfere with quantum. The award shall stand.

49. Regarding the respondent assertion that the two hospital receipts contained in page 19 of the record of appeal have been sneaked in the record of appeal irregularly, the assertion is not one of the appellant's grounds of appeal. The respondent ought to have filed an amended memorandum of appeal to contest the receipts and not the notice of motion dated July 4, 2022 wherein it sought an order to strike out the receipts. That is not to say that this court has considered the receipts as the receipts were neither

produced as exhibits before the trial court nor pleaded as part of the medical expenses. The Supreme Court in *Raila Amolo Odinga & another v IEBC & 2 Others* (2017) eKLR expressed itself as follows:-

> "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....."

Disposition

50. In the premises, the court finds as follows;

    a. The appeal has merit partly.

    b. The trial court's judgment in Mavoko in civil case No 1064 of 2016 on the question of proof of injuries is partially set aside.

    c. The cost of the appeal and the trial court shall be borne by the respondent.

    d. General damages of Kshs 50,000/- is upheld and will attract interest at court rates from the date of judgment in the trial court.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF OCTOBER, 2022 (VIRTUAL/PHYSICAL CONFERENCE)

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

NYANCHAMA - FOR THE APPELLANT

KITHUVA - FOR RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)