



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 191 OF 2019**

**DHARMAGHA PATEL.....1<sup>ST</sup> APPELLANT/APPLICANT**

**AKSHAR AUTOSPARES LTD.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**TA (A minor suing through the mother and next friend HH)..... RESPONDENT**

**RULING**

1. The appellants/applicants filed the Notice of Motion dated 1<sup>st</sup> March 2020 seeking orders;

1. *THAT the applicants be granted leave to produce additional oral and documentary evidence in the instant appeal.*

2. *THAT this Honourable Court be pleased to take additional evidence in the form of:*

(a) *Documentary Evidence by a Consulting Neurosurgeon on the patient TA;*

(b) *Oral evidence by a **Consulting Neurosurgeon** on the patient TA;*

3. *THAT this Honourable Court be pleased to direct that a neurological assessment on the Patient, the Respondent herein, TA be conducted by an independent and impartial medical practitioner in the field of **Neuropsychiatry**.*

4. *THAT this Honourable Court be pleased to give further orders and or directions as it may deem just and expedient to grant in the circumstance.*

5. *THAT costs of this Application be provided for.*

*(Emphasis mine)*

2. The grounds for the application are set out on the face of the application;

1. *THAT the present appeal originates from the judgment of the Hon. Chief Magistrate's J. B. Kalo dated 15<sup>th</sup> October 2019 in Nakuru CMCC No. 64 of 208.*

2. *THAT during trial, the Plaintiff (Respondent herein) produced as exhibit a medical report prepared by Dr. Ng'etich while the Defendant (the Appellant herein) produced as exhibit a medical report prepared by Dr. Malik.*

3. *THAT the Trial Court while rendering its judgment, stated that it was faced with herculean task in determining which medical report to go by in respect of the said medical reports by Dr. I.K. Ngetich and Dr. M. S. Malik produced as exhibits with regard to the nature and extent of injuries sustained by the Respondent herein for the reasons that;*

a. *That both reports are conflicting. Both contain conflicting medical opinions.*

b. *THAT both reports were prepared by Doctors who are consultant surgeons and that there was nothing to tell them apart.*

c. THAT neither Medical report establishes with absolute certainty the nature and extent of injuries sustained by the Respondent especially on his current mental health and status, reason as to why the trial court was to properly make its determination.

3. The Notice of Motion was also supported by the Affidavit of Adams Maiyo, Advocate. He deponed *inter alia*; (at paragraphs 7, 8 and 9);

7. THAT as a result of the contradictions caused/created by the said medical reports drawn by Dr. I. K. Ngetich and Dr. M.S. Malik, and the reluctance of the trial court to take into consideration both reports in coming up with a conclusive determination on the nature and extent of injuries sustained by the Respondent herein; there is need to subject the Respondent to **a final neurological assessment** on the Respondent, TA by independent and impartial medical practitioner in the field of **neuropsychiatry**.

8. THAT consequently, should the instant Appeal proceed to hearing in the state and manner it currently is, this Honourable Court will be faced with the same difficulties faced by the Trial Court and cannot therefore be in a position to render a determination that is clear of any doubts, uncertainties and/or ambiguities due to the said conflicting medical reports which shall be subjected to a further analysis and review by this Court.

9. THAT it is important therefore that at this stage, **a further final medical examination** be conducted on the patient/respondent by an **independent and impartial medical practitioner in the field of neuropsychiatry** to truly establish the exact nature and extent of injuries sustained by the Respondent to break the deadlock faced by the trial court. (Emphasis mine)

4. The application was opposed by the Replying Affidavit of HH, sworn on 11<sup>th</sup> August 2020. She deponed that on the advice of her advocate, the application lay no sufficient legal basis for the orders sought, was inept, frivolous, mischievous and lacking in merit, and brought in bad faith. Further and particularly; at paragraphs 8, 10, 12 and 16

8. THAT the intended new evidence in non-existent and if the applicant is allowed to tender the fresh evidence as is intended the same shall be tantamount to enabling the appellants make out a fresh case on appeal.

10. THAT I am aware of my own knowledge that the further evidence sought to be procured on appeal could have been reasonably presented before the trial court, the applicant had an opportunity to correct the stalemate alleged in his application, if at all, before the trial court but which opportunity she spurned.

12. THAT I shall suffer great prejudice if the application is allowed since I shall not have an opportunity to re-open my case and tender fresh evidence, my entitlement to prepare my case adequately before trial shall be compromised as I shall be faced with totally new evidence that is yet to be manufactured. The need to seek a third medical opinion was always available and all that the applicant needed was to procure the same in good time and the said evidence would have been placed on record before conclusion of the case.

16. THAT it is over ten years since the minor, the subject of these proceedings, was involved in the accident, the applicant has had more than enough time to subject the minor to whatever kind of examination and which opportunity the applicant ignored; in any case the results that would have been established through any medical examination 10 years ago would definitely vary from any future examination results. The prayers sought shall therefore not aid the court to address the issues that were presented before the trial court conclusively but rather bring about fresh issues on appeal and which invitation this Honourable Court must decline.

5. To give context, it is evident that prompted the application and the appeal were the observations of the Hon JB Kalo Chief Magistrate, in his judgment in CMCC 1142 of 2009 delivered on 15<sup>th</sup> October 2019 where he stated:

*“There are two conflicting medical reports with regard to the nature and extent of the injuries sustained by the plaintiff. Dr. Ngetich awarded a permanent disability of 40% while Dr. Malik opined that the plaintiff did not suffer permanent disability. Dr. Ngetich found that the plaintiff sustained serious injury resulting in permanent facial laceration and permanent head injury leading to drastic behaviour and attention span deficit while Dr. Malik found that the plaintiff did not suffer any permanent physical disability. Both doctors and consultant surgeons and there is nothing to tell them apart. It is a herculean task for the court to determine which medical report to go by.*

6. The record shows that he was dealing with a running down case for compensation for the injuries sustained in an accident which took place fourteen years ago, on the 18<sup>th</sup> October 2007. The plaintiff/respondent who was a minor, was playing in their compound when a motor vehicle registration number KAW 585W owned by the Appellants/ applicants hit him. The injuries he sustained were described severe soft tissue injuries on the arms, severe head injuries and friction burns on the face leading to permanent facial laceration, permanent head injury. That the head injury resulted in drastic behavioural change, attention span deficit, learning impairment and abnormal growth development.

7. The parties had presented the learned trial magistrate with two expert reports: two medical reports by two neurosurgeons; Dr. Ngetich and Dr. Malik. The learned trial magistrate took on the herculean task. Upon analysis of the evidence before him, he made the finding that at the time of examining the plaintiff, Dr. Ngetich was working at Nakuru Provincial General Hospital while Dr. Malik was in private practice and was instructed to examine the plaintiff in that capacity. He then drew the following conclusion:

***In the circumstances of this particular case the court shall rely on the findings of Dr. Ngetich by virtue of the fact that he was not specifically instructed by the plaintiff's parents to examine the plaintiff and is therefore unlikely to be biased.***

8. Having done so he considered the submissions by counsel for the parties, the authorities relied on and comparable authorities and made an

award of Kshs. 1,500,000/= general damages for pain, suffering and loss of amenities, Kshs. 3,000/= special that were pleaded and proved.

9. The applicants were aggrieved by the entire Judgment and filed this appeal on the following grounds;

1. *THAT the Learned Trial Magistrate erred and misdirected himself as to the exact and nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent which was manifestly excessive.*

2. *THAT the Learned Trial Magistrate erred in law and in fact by failing to consider and analyse the 2<sup>nd</sup> Medical Examination Report by one Dr. M. S. Malik and hence arrived at a wrong determination on the aspect of quantum awardable to the Respondent.*

3. *THAT the Learned Trial Magistrate erred in law and in fact in failing to give proper and sufficient justification for the outright dismissal of Dr. M. S. Malik's Medical Report which was conducted to give a comparative analysis of the Respondent's injuries.*

4. *THAT the Learned Trial Magistrate erred in law and in fact by failing to give a comparative analysis of the awards made in respect of the injuries sustained by the Respondent to justify awards made in respect of quantum.*

5. *THAT the Learned Trial Magistrate erred in law and in fact by failing to consider Defendant's written submissions and the subsequent authorities cited and attached thereof in support and in respect of the following matters in question:*

(a) *Medical and health status of the Respondent considering the totality evidence from medical report of Dr. M. S. Malik dated 25<sup>th</sup> July 2011 produced during trial in respect of the Respondent.*

(b) *Quantum awardable to the Respondent in consideration of (a) above.*

6. *THAT the Learned Trial Magistrate erred in law and in fact by awarding general damages that were excessive and unrealistic considering the injuries sustained by the Respondent and the evidence in totality that was adduced during the proceedings by the Appellants.*

7. *THAT the Learned Trial Magistrate failed to appreciate the totality of evidence before him and failed to give a concise statement of the case, the points of determination, the decision thereon and reasons for the judgment pronounced on 15<sup>th</sup> October 2019.*

10. The applicant is of the view that without the additional evidence this court will be unable to pronounce its judgment in the appeal.

11. Each party each party filed written submissions through their respective advocates.

12. Both parties are in agreement that the issue for determination is whether the orders sought are tenable.

13. Both rely on the same applicable law which is **Section 78 of the Civil Procedure Act** which sets out the powers of the appellate court viz;

*(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*

*(a) to determine a case finally;*

*(b) to remand a case;*

*(c) to frame issues and refer them for trial;*

*(d) to take additional evidence or to require the evidence to be taken;*

*(e) to order a new trial.*

*(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.*

14. Both also rely on **Order 42 Rule 27 of the Civil Procedure Rules** provides further guidance on how additional evidence is to be produced in the appellate court. It states

*(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—*

*(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted;*  
*or*

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

15. Counsel for the applicants submitted that the issue of additional evidence on appeal was an issue to be decided on a case by case basis but certain principles had been set out by precedent. It was submitted that one of them was the **true test** for an appellate court to apply in determining whether or not to admit new evidence. That that test was set in the **Supreme Court of India, Union of India vs Ibrahim Uddin & Another (2012) 8SCC 148** where the Court stated:

***“The true test...is whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be produced.”***

16. That in addition to the true test, additional evidence would be admitted where the **interests of justice** required it. For this the applicant relied on **Schwartz vs Million AIR Inc. 341 F. 3d 1220, 1223 – 26 (11<sup>th</sup> Cir 2003)** cited in the **Kenya Supreme Court Petition No. 7/2018 Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR.**

17. It is also argued for the applicant that the additional evidence could also be admitted to “**elucidate evidence already on record.**” For this the case cited was the Supreme **Court of Uganda** in **AG & Another vs Africa Co-operative Society Limited Misc. Application 6 of 2012** cited in **Mohamed Abdi Mohamud** (above).

18. The applicant also urged that the respondent would not suffer any prejudice, that the court to find that by exercising its discretion in allowing this application this court would doing justice, and that this application sought to cure the difficulties faced by the learned trial magistrate who in turn exhibited bias in relying on one report and rejecting the other.

19. For the respondent it was argued that the provisions of **Order 42 rule 27 of Civil Procedure Rules** have been interpreted and guidelines set out for the exercise of the court’s discretion in the matter of dealing with additional evidence. The respondent relied on **Kihuha James & Another vs Margaret Njeri Ngure [2017] eKLR** where the court cited **Wanjie & Others vs Sakwa & Others E40 (1984) KLR 275** in which case the Court of Appeal had cited with approval **Lord Denning** in **Ladd vs Marshall (1945) 1 WLR 1489** at **paragraph 1491**: The Court of Appeal stated:

***“The principle upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning L. J, as he then was, in the case of Ladd vs Marshall (1945) 1 WLR 1489 at page 1491 and those principles are:-***

***(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.***

***(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.***

***(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”***

20. On that basis it is argued that the applicants had not shown that the evidence could not have been sought and obtained at the trial. That the applicants were all aware of the conflict in the two (2) medical reports but never sought to call the doctors for cross examination and seek to produce any other evidence.

21. Secondly, coming more than ten years after the second report the evidence would affect the outcome of the intended report would not assist the appeal or resolve the issues faced by the trial court, but instead would introduce new evidence that was not before the trial court, to the prejudice of the respondent.

22. The respondent further argued that, contrary to the intention of the law, this was a case of the applicants patching out their weak case by bringing in fresh evidence, which evidence was not before the trial court, so as to strengthen their case to the prejudice of the respondent who would not have a similar opportunity. The respondent relied on **Wanjie & Others vs Sakwa & Others. (1984) KLR 275** where the court held:

***“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”***

23. I have carefully considered the both the rival affidavit evidence and the submissions by counsel for each party. The questions that arise towards the determination of the issue whether the orders sought are tenable are summarised by the requirements of **order 42 rule 27 of the**

**Civil Procedure Rules:**

- i. Whether the court from whose decree the appeal is preferred refused to admit evidence which ought to have been admitted; or
- ii. Whether this court to which the appeal is preferred **requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or**
- iii. Whether there is any other **substantial cause** upon which this court may allow such evidence or document to be produced, or witness to be examined.

24. On the 1<sup>st</sup> issue is evident that the learned trial magistrate did not refuse to admit the evidence of the two medical doctors. Both reports are on record. The evidence the applicants seek to introduce is not yet in existence as the respondent is yet to be examined by someone else who is expected to come up with the report. Should the applicant be allowed to go and obtain **fresh evidence 14 years after the event?**

25. On the second question, the issue about the medical reports is an issue already raised in the Memorandum of Appeal for the appellate court to determine whether the learned trial magistrate was in error by choosing to rely on one of the reports instead of the other. The appeal is yet to be heard hence this court has not had the opportunity to determine whether or not it will require the said evidence to be able to pronounce its judgment. It is not for the applicant to tell this court that it will find itself in the same quagmire as the trial court. How would the applicants know that unless they are seeking to influence the mind of the court? I am certain that any court applying itself to the issue would be able to determine for itself whether or not it requires any extra information to arrive at the appropriate determination. It is for the court hearing the appeal to find the necessity, at the hearing of the appeal, for this new evidence or for a witness to be further cross examined. In the words of the Judge in **Wanjie & Others (above)** the court must find the additional evidence **needful**.

26. The court must also be shown that this evidence could not have been obtained with reasonable diligence at the trial. It is an undisputed fact that the applicants were always aware of the great disparity between their medical report and the report produced by the respondent. The applicants were not ambushed by the conflicting medical evidence. It was they who introduced this other report through their request for a second medical opinion and ought to have done their due diligence to deal with the question of how the court would decide which report to rely on. The reports were always there. The applicants had the opportunity to have the doctors called for cross examination to clearly demonstrate reasons for their divergent opinions. They ought to have expected that the court would have to deal with that disparity. They too could have called in the doctors for cross examination or asked for a 3<sup>rd</sup> report at the trial. They were satisfied with the reports as they were until the court decided the way it did. The issue of the reports and the manner in which the trial court dealt with them is also subject of the appeal. They ought to wait for the appeal and demonstrate how the trial court could have balanced the two reports and not try to create new evidence on appeal.

27. On the 3<sup>rd</sup> question- is there a substantial cause? For instance is it in the interests of justice? Does the court need any further elucidation of the evidence on record? It would not be in the interests of justice to open the box of new evidence otherwise litigation would never end. The applicants would want what they refer to as a further and final report, by a specialist in neuropsychiatry. This was not an issue before the trial court. What if then the respondent would like a counter report by another specialist? If the two (2) neurosurgeons can produce such divergent reports, what certainty do we have that a 3<sup>rd</sup> one will not just throw a further spanner in the case? It appears to me that in the circumstances of this case, this appeal would not be about the speciality of the doctor but the analysis of their reports. The interests of justice will therefore be served by the hearing and determination of this appeal.

28. What about the allegation of bias. Is that a substantial cause? The applicants allege bias on the part of the trial magistrate in choosing one report over the other and are apprehensive that this court might fall victim. Again that would be an issue for determination in the appeal. The applicants will have the opportunity to deal with that there. Suffice it to say here that the trial court finding that the two reports placed before him were conflicting and his decision to rely on one report instead of the other cannot be a ground for new evidence. In his judgment the learned trial magistrate picked as an issue for determination the nature and seriousness of the injuries sustained by the respondent. He proceeded to point out what each doctor had written, while acknowledging their professional capacities and made a determination on the evidence that was placed before him. To my mind that does not express bias. He gave reasons for making that determination, the difficulty of the conflicting medical evidence notwithstanding. He made a decision. He drew his own conclusions from the evidence as presented and made a decision which decision is the subject of this appeal.

29. What about prejudice? I find that to be substantial cause but it tilts in favour of the respondent considering the period of time that has lapsed. A new report would re-opening the applicant's case.

30. In **conclusion**, the conditions set out at **Order 42 rule 27** are crucial. It begins by saying that the parties **shall not be entitled to the order for additional evidence** Hence the burden is on the applicant who must **demonstrate** the fulfilment of the specific requirements set out by the law. This the applicants have not done.

31. To re-emphasise, the power to take additional evidence or require it to be taken is limited, and for good reason.

32. It is my considered view that the applicant could have resolved any issues he had with the reports by seeking these orders at the trial. By failing to exercise that due diligence the applicant cannot be heard to seek that now.

33. In my view, circumstances of this case do not warrant the prayers sought.

34. The application is dismissed with costs.

**Dated and delivered virtually this 26<sup>th</sup> Day of February, 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of:**

Court Assistant Edna

Mr. Maiyo for the applicant

Mr. Nanda for the Respondent.