



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 57 OF 2017**

**ROBERT NGANDE KATHATHI.....APPELLANT**

**VERSUS**

**FRANCIS KIVUVA KITONDE.....RESPONDENT**

**(Being an appeal against the Judgment on quantum of the Senior Resident Magistrate,**

**Honourable J.A Agonda in Mavoko SPMCC No. 629 of 2015**

**delivered on 21<sup>st</sup> April, 2017)**

**BETWEEN**

**ROBERT NGANDE KATHATHI.....PLAINTIFF**

**VERSUS**

**FRANCIS KIVUVA KITONDE.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 3<sup>rd</sup> August, 2017, the Plaintiff/Appellant herein instituted a suit against the Defendant/Respondent herein claiming general damages, special damages, costs and interest in respect of a road traffic accident that occurred on 3<sup>rd</sup> April, 2015.
2. On 3<sup>rd</sup> February, 2017, the parties herein recorded a consent in the suit. It is important to reproduce the said consent for its full terms and tenor. By the said letter the parties requested the court to record the following order:

**“BY CONSENT”**

- 1. THAT judgement on liability is hereby entered in the ratio of 30:70 in favour of the Plaintiff as against the Defendant.**
- 2. THAT quantum be determined by way of written submissions.**
- 3. THAT special damages of Kshs 9,700/= be awarded to the Plaintiff.**

3. The parties then proceeded to file submissions and based thereon, the learned trial magistrate by a judgement dated 21<sup>st</sup> April, 2017 awarded the Plaintiff/Appellant Kshs 350,000/- as general damages and Kshs 9,700/- as Special Damages, which sum was discounted by 30% leaving the net balance of Kshs 251,790/=. She also awarded the Plaintiff/Appellant the costs of the suit with interests.

4. Aggrieved by the said decision, the Plaintiff/Appellant herein has lodged this appeal in which it is challenging the said award on the ground that the award was too low in the circumstances.

5. In arriving at her judgement, the learned trial magistrate stated that the parties by consent agreed to produce the medical report dated 25<sup>th</sup> June, 2015 by consent. It was that medical report that seemed to have informed the decision on the award of damages.

6. It is clear that before the trial court apart from the consent on liability, no hearing took place. Although the learned trial magistrate stated that the parties agreed to produce the medical report by consent, that finding is neither supported by the proceedings nor by the consent which I have reproduced in full hereinabove. That finding seems to have been based on the submissions of the Plaintiff/Appellant since the Defendant/Respondent did not make any submissions. Apart from the fact that there was no hearing, the parties did not agree to produce any document by consent. It would seem that the court relied on the plaint and the plaintiff's list of documents which were filed in the said suit.

7. Section 35(1) of the *Evidence Act*, provides as follows:

**In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact.**

8. In this case as no documents was produced by consent or otherwise, there were no facts before the trial court on the basis of which the injuries sustained by the Plaintiff/Appellant could be proved.

9. That averments in pleadings are not evidence was appreciated in Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in Mohammed & Another vs. Haidara [1972] E.A 166 where that the contents of a plaint are only allegations, not evidence. According to Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

**"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."**

10. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

**"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".**

11. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

12. It would seem that the parties, and particularly the Plaintiff/Appellant believed having recorded a consent on liability each party was at liberty to rely on the documents filed with the plaint without the same being formally produced in evidence in support of the quantum. It was not stated that the said documents were to be produced in evidence because the consent did not deal with the calling of witness.

13. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved. It is however unfair to the court to just throw all manner of documents at the court by way of annexures to the submissions and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by Ringera, J (as he then was) in Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:

**"...the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise."**

14. The same Judge in Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 held that:

**"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only**

decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident.”

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.”

16. However, where the parties produce exhibits by consent the court has no option but to make the best out of them. In Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003, the Court of Appeal held that:

“The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as “No qualifications disclosed; the doctor is not a consultant”. If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident.”

17. In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwigite vs. Austin Kiguta & 2 Others (2015) eKLR where the court held:-

“16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit”

17. The respondents' contention is that the appellant by failing to object to the three documents marked as “MFI 1”, “MFI 2” and MFI 3” must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for

identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification....."

18. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

19. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

20. Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

21. As stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

"Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

22. The Court of Appeal in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

23. The mode of hearing in civil suits is provided for in Order 18 rule 2 of the *Civil Procedure Rules* as follows:

2. Unless the court otherwise orders—

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case.

(3) The party beginning may then reply.

24. It is clear that the court is given a discretion to deviate from that prescribed mode of hearing. However, the said rule provides that there

must be an “otherwise” order if that is to happen. The parties may for example agree that certain documents be admitted in evidence by consent. However, parties must as much as possible see to it that they do not produce by consent documents whose contents are diametrically contradictory. In any event however, what the law requires is that evidence be produced in support of the issues in contention whether at the hearing or by consent. However, documents filed with pleadings do not *ipso facto* amount to evidence since such documents are not introduced by consent or on oath.

25. Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect is to amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court’s process or exposes the adjudicatory process to ridicule ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In my view whereas in adversarial systems like ours parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to be lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote **Oder, JSC** in the case of **Gokaldas Tanna vs. Rosemary Muyinza & DAPCB SCCA No. 12 Of 1992 (SCU)**:

**“An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions”.**

26. The current trend is that the Court must always be on the driving seat of litigation and this was appreciated by the Court of Appeal in **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, where it was held *inter alia* that:

**“on 23<sup>rd</sup> July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”**

27. It is clear that the manner in which the proceedings before the learned trial magistrate rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law.

28. What then is the consequence of that? In **Mumias Agricultural Transport vs. Sony Agricultural Ltd. Civil Appeal No. 201 of 1997**, the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing.

29. In the premises the order that commends itself to me and which I hereby make is that the judgement of Mavoko Chief Magistrate’s Court in SPMCC No. 629 of 2015 delivered on 21<sup>st</sup> April, 2017, is hereby set aside. The matter is hereby remitted to the said court for hearing and determination of the case in the manner stated hereinabove.

30. For avoidance of doubt the consent on liability and special damages remain undisturbed.

31. There will be no order as to the costs of this appeal since the appeal was unopposed.

32. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 12<sup>th</sup> day of March, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered the absence of the parties.**

**CA Geoffrey**