



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 56 OF 2014**

**REBECCA ADAMS.....APPELLANT**

**VERSUS**

**FRANCIS MUTAVI KIMUYU.....RESPONDENT**

**(Being an Appeal from the judgment of the Magistrate's court in Mavoko in SRMCC No. 541 of 2012 delivered on 3<sup>rd</sup> April, 2014 by Hon. E.K Too (Ag. Senior Principal Magistrate))**

**FRANCIS MUTAVI KIMUYU.....PLAINTIFF**

**VERSUS**

**REBECCA ADAMS.....DEFENDANT**

**JUDGEMENT**

1. According to the plaint filed by the Appellant herein, **Francis Mutavi Kimuyu**, who was the plaintiff in Mavoko SRMCC No. 541 of 2012, on or about 3<sup>rd</sup> February, 2012, the Respondent was asked by the Respondent, who was the registered owner of motor vehicle reg. No. KAM 254V, to get into her car. However, before the appellant could fully board the said vehicle, the appellant jerked the vehicle as a result of which the Respondent fell off and was dragged by the car for a distance and in the process sustained serious injuries.
2. It was the Respondent's case that the accident was caused by the sole negligence of the appellant. The respondent set out the particulars of negligence, injuries and special damages in the plaint and claimed damages and expenses of the suit as well as the costs and interests.
3. On 4<sup>th</sup> February, 2014 a consent was entered on liability in which judgement was entered at the ratio of 30:70 against the defendant and in the same consent, it was agreed that the quantum of damages would be determined by way of written submissions with parties annexing supporting documents. The documents which were filed by the applicant though not expressly mentioned to be exhibits in the case were P3 form, case summary and treatment chits from Kitengela Health Centre, Case Summary from Batian Clinical Services and Case Summary from Coptic Hospital. On behalf of the Defendant the same documents were relied upon together with a medical report prepared by **Dr Wambugu P M.**
4. In his judgement the learned trial magistrate considered the submissions, the medical documents and submissions made by the parties, and in his judgement found that though the authors of the medical reports in particular the P3 form and the medical report were not called, he had no option but to conclude that the respondent suffered the stated injuries particularly as the parties did not specifically indicate which documents were to be produced and which ones were not to be admitted. In his view, in those circumstances the court could not interfere with the parties' agreement on the production of documents.
5. On the authorities of HCCA No. 32 of 2005 - **JML vs. The African Highlands Produce Co. Ltd [2011] eKLR**, **Kiwanjani Hardware Limited & Another vs. Nicholas Mule Mutinda [2008] eKLR** and **David Lempoko vs. Kenya Commercial Bank [2013] eKLR**, he proceeded to award the Respondent Kshs 1,050,000.00 being general damages less Kshs 315,000.00 contribution hence the net general damages awarded were Kshs 735,000.00. To this sum he added Kshs 1,550.00 special damages to bring the total to Kshs 736,550.00. He also awarded costs and interests.
6. In this appeal the appellant relies on the following grounds:

**(1) The learned trial magistrate erred in fact and law by way he weighed the evidence before the court to determine the issue of quantum.**

**(2) The learned magistrate erred in fact and law by finding that the Respondent suffered from incontinence and impotence despite clear evidence to the contrary.**

**(3) The learned magistrate erred in law and in fact by awarding manifestly excessive sum of Kshs 1,000,000.00 as general damages for soft tissue injuries.**

**(4) The learned magistrate erred in law and in fact by considering documents tendered by the Respondent which documents were not properly on record, neither had they been served upon the appellant contrary to the provisions of Order 3 and Order 11 of the Civil Procedure Rules.**

**(5) The learned magistrate erred in law and in fact by failing to substantially and adequately consider the appellant's submissions.**

7. In the submissions filed on behalf of the appellant it was contended that the medical documents relied upon by the Respondent as listed on the Plaintiff's list of documents are: the P3 form, Medical Summary and Treatment notes. However, the Plaintiff/Respondent unprocedurally annexed the following documents to his written submissions:

- i. The letter dated 22<sup>nd</sup> August, 2012 from Coptic hospital
- ii. The patient health record book from Kitengela Health Centre
- iii. The work injury evaluation clinic findings from the directorate of occupational safety and health services dated 8<sup>th</sup> August, 2012
- iv. The medical summary from Batian Clinical services
- v. The medical summary from Kitengela Health Centre dated 31<sup>st</sup> July, 2012.

8. It was however submitted that on 4<sup>th</sup> February, 2014 when a consent on liability was recorded and adopted at the ratio of 70:30, the parties agreed that quantum to be disposed of by way of written submissions and the parties to attach their respective medical reports. The Respondent attached all the above documents yet they had not been previously filed nor served them upon the Plaintiff/Appellant. The appellant lamented that this is tantamount to a trial by ambush. The only time that the Appellant was made aware of the said documents was when they were annexed to the Respondent's submissions as none of the above documents were listed in the Plaintiff's list of documents or his supplementary list of documents. It was therefore submitted that the documents were not brought properly before the court as the Respondent never sought leave to file a further supplementary list of documents to justify production of those documents. This is evidence coming from the bar which should not be allowed under whatever circumstances. It was therefore submitted that it was not in the interest of justice for the learned magistrate to rely on documents that were neither properly on record nor served upon the Defendant/Appellant.

9. It was therefore submitted that the learned trial magistrate erred in fact and law by considering documents tendered by the Respondent that were not properly on record, neither had they been served upon the Appellant contrary to the provisions of Order 3 and Order 11 of the **Civil Procedure Rules**.

10. It was further submitted that the injuries pleaded on the plaint were blunt trauma to lower lumbar region, injury to the urinary section and impotence and blunt trauma to the left hip. However, Dr. Wambugu's medical report dated 10<sup>th</sup> September, 2013 did not mention that the Plaintiff/Respondent sustained an injury to the urinary section and impotence. In fact, the medical report only indicates that the Plaintiff suffered soft tissue injuries. The injury sustained according to Dr. Wambugu's medical report is a blunt back trauma. The complains that the Plaintiff/Respondent had on the day of the examination were low back pains especially on exertion and testicular swellings on walking long distances. However, no incontinence or erectile dysfunction was found.

11. According to the appellant, the Doctor's physical findings of the genito-urinary system were that: *"the Plaintiff has normal external genitalia. Scrotum and testes are normal size. No groin hernia's elicited. No features of urinary incontinence noted"*. His opinion and prognosis was therefore that *he sustained soft tissue injuries from which he has made adequate recovery. There was no urinary incontinence elicited during today's clinical evaluation. He did not complain of erectile dysfunction. I thence assert that no permanent incapacitation occurred"*. It was submitted that the learned magistrate in his judgment also admitted to this fact in his judgement when he stated that:

*"From the medical report by Dr. Wambugu, the doctor indicated that the Plaintiff suffered soft tissue injuries..."*

12. Was therefore submitted that the magistrate erred in fact and law by finding that the Respondent suffered from incontinence and impotence despite clear evidence to the contrary. It was reiterated that since the learned magistrate relied on documents that were not properly on record in delivering his judgment on general damages at Kshs. 1,000,000.00, this court should find that indeed the Plaintiff/Respondent did not suffer from an injury to the urinary section and impotence and proceed to award an award of Kshs. 150,000.00 for general damages as submitted in the Defendant's written submissions dated 3<sup>rd</sup> March, 2014 and filed on 11<sup>th</sup> March, 2014.

13. On behalf of the Respondent, this Court attention was drawn to *the documents filed after the list of the defendant's documents which according to the Respondent are the plaintiff's further list of documents dated 14<sup>th</sup> June, 2013 and filed on the same day which documents*

were served upon the Appellant's advocate on record on 21<sup>st</sup> June, 2013 and the same bears the stamp of the Appellant's advocate on record showing that service was effected on that day. According to the Respondent, the plaintiff's further list of documents aforesaid contain the documents that the Appellant are disputing were never served upon them while they are in the record of appeal compiled by the Appellant showing that service was effected upon them and that they were filed in court. It was submitted that if the said documents were never served upon the Appellant, then it is a mystery as how the Appellant came to be in possession of the said documents. However, as the same were served and the same bears a stamp from the Appellant's advocate on record showing service of the said documents was done, that issue does not arise.

14. According to the Respondent, parties entered consent on liability on 4<sup>th</sup> April, 2014 while the above quoted documents that are in contention were served upon the Applicant on 21<sup>st</sup> June, 2013. Thus the issue of ambush does not arise at all as the Applicant was aware of the documents before the said consent was recorded in court.

15. It was therefore submitted that the trial magistrate did not err in considering the said documents as they were properly on record before the trial court and in the proceedings. The Applicant never filed any objection to the said documents after the documents were served upon. Thus the Appellant never having objected to the said document being on record after they were served, the trial magistrate was right in considering the said documents which were properly on record and formed part of the court proceedings in rendering the court's decision. Thus this ground of Appeal does not only fail but fails miserably.

16. As regards the issue whether the respondent was entitled to such excessive award of damages, it was submitted that the Appellant only produced one doctor's report as to the injuries suffered by the Respondent whereas the Respondent offered documents from 5 different institutions and doctors as to the extent of his injuries. In the circumstances, the trial court was going to be persuaded by the report of 5 different doctors who independently examined the Respondent and came to the same conclusion that he suffered blunt trauma to lower lumbar region, injury to the urinary section and impotence and blunt trauma to the left hip. It was therefore submitted that the trial magistrate did not err in awarding the Respondent the sum of Kshs. 1,000,000/= as general damages considering the injuries as suffered by the Respondent.

17. The Respondent therefore prayed that the Appeal be dismissed with costs to the Respondent.

#### **Determination**

18. In this appeal, it is clear that the appellant is only challenging the quantum of damages. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.

19. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

20. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

**“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”**

21. Similarly, in Jane Chelagat Bor vs. 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.”**

22. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

**“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect... A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”**

23. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

**“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”**

24. In this case, I am perturbed by the manner in which the proceedings before the trial court were conducted. Having consented to liability and properly so in my view, the parties adopted a strange way of assessment of damages. They consented that ‘*on the issue of quantum, the same to be determined by way of written submissions. Parties to annex case supporting documents. Mention on 04/03/2014*’. My understanding of the foregoing was that the parties having recorded a consent on liability each party was at liberty to annex the documents 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. The Appellant cannot now claim that the procedure adopted by the Respondent in exhibiting documents in the submissions was improper.

25. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to throw at the court medical reports without bothering to confirm their consistency. To my mind once parties agree on liability they ought to endeavour to harmonise the various medical or expert reports on record and agree at a common ground regarding the basis upon which assessment of damages is to be undertaken. If they are unable to do so, the makers of those reports ought to be called where the reports are conflicting for cross-examination. It is however unfair to the court to just throw all manner of reports at the court 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.”**

26. 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.”**

27. In my view parties and their counsel ought not to just throw medical reports or expert opinion reports for that matter which are divergent in material aspects without calling the makers thereof. This was the position of the Court of Appeal in **Auni Bakari & Another vs. Hadija Olesi Civil Appeal No. 70 of 1985** where it held that it is desirable to call a doctor to explain the discrepancy in a medical report.

28. The procedure of admitting in evidence expert opinion reports which are not substantially the same is, in my view, a short cut that ought not to be permitted in litigation. As was held by **Ringera, J** (as he then was) in **David Ndung’u Macharia vs. Samuel K Muturi & Another Nairobi HCCC No. 125 of 1989**:

**“...an order that a medical report be agreed, or in the alternative that medical reports be exchanged, and that the attendance of doctors as witnesses should be dispensed with ought never to be made as a matter of form. The Court must be**

satisfied by the applicant for such an order that undue delay or expense would be caused in the suit unless the attendance of doctors is dispensed with... There are cases in which the order may be useful, as for instance, where a man has broken his leg and the doctor is only required to say how long the man has suffered and that there is no permanent injury. There may be cases in which there is no permanent injury and one does not require a doctor to tell one that, if there is no disagreement about it...However, in a case where prognosis is an important matter, it is most desirable that a doctor, or doctors should be present in court to answer any questions which the Judge may wish to ask and this is because we ought not to discourage the making of that order in proper cases, but the direction ought not to be included as a matter of course. The master to the Registrar should consider whether the case is suitable for hearing with a report and if it is, the order ought to be made and the parties should observe it...The second issue is that it is only an agreed report that can properly be admitted in evidence without calling the maker. The mere exchange of medical reports does not render such report or reports admissible without calling the maker(s) unless one or both of them have been agreed. A direction that medical reports be exchanged is no more than an order in the nature of mutual discovery of medical evidence. It must be understood that orders that a medical report be agreed and the same be admitted in evidence without calling the maker are made for the purpose, not of hindering the administration of justice, but of assisting it. If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately embarrassed between the two views and the two statements. The whole object of the type of order is to ensure that matters of medical fact, and matters of medical opinion shall if possible be agreed by the medical men and that is the object and the sole object of orders of this kind, and indeed no order could achieve anything more. The practice was certainly never intended to admit of inconsistency and differing medical points of view being put before the Judge and described as agreed medical reports. You cannot have an agreement on two inconsistent statements of fact, and the phrase "agreed medical report" means, and means only a report where the facts stated are agreed as true medical opinions expressed and accepted as correct. In the normal case in pursuance of an order of this kind, the doctors on the two sides would meet and embody their views in a document which they both may sign and that is very convenient, and would save a great deal of trouble and expense in many cases, but it is not to be understood that orders of this kind are to be made as a matter of course. It would depend very much on the nature of the case and the nature of the injuries, and whether it will save trouble and expense and in the long run by dispensing with the doctors at the hearing. On an interlocutory application some discretion must be exercised by the master who is making the order as to whether it will be a saving of expenses to make this type of order, but it must not be taken that is all that is necessary. The case may be one where the report of the first doctor is accepted by the other doctor. If on the other hand there are likely to be points of controversy, then if the agreement is to be completed they can only solve them by coming to an agreement, and if they cannot come to an agreement, there can never be an agreed report and that is the object of this procedure...In short it is for the parties' doctors (and not the parties themselves, or their advocates) to agree on a medical report and if the doctors have not agreed by either adopting one report or jointly authorising a single report there is no agreed report...In the circumstances of this case, the court is satisfied that there was no agreed report and accordingly the orders made at the hearing of the summons for directions did not relieve the plaintiff off the burden of calling the doctor to testify and as he did not come to testify, his report is held to be inadmissible in evidence and the court will not look at it for any purposes in the trial. P3 form is admissible in evidence as an entry in a public record stating a relevant fact within the contemplation of section 38 of the Evidence Act and the court will bear its contents in mind in assessing the damages."

29. Where parties intend to rely on medical reports only they ought to confirm that the same are substantially the same in terms of injuries sustained. 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."**

30. However, once the parties produce the same 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."**

31. The words of **Byamugisha, J** in **Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987** however need to be taken note of. In that case the learned judge held, citing **Sarkar on Evidence** 12<sup>th</sup> ED pp 506.R. that:

**"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."**

32. In this case however, the learned trial magistrate himself was not amused by the procedure adopted. The learned trial magistrate therefore, and quite properly in my view, followed the path taken by the Court of Appeal in **Ali Ahmed Naji vs. Lutheran World**

**Federation** (supra) when he expressed himself as follows:

**“The parties’ agreement on production of documents did not specify which documents were to be produced and which ones were not to be admitted. The Court cannot therefore interfere with the parties’ agreement on production of documents.”**

33. In his judgement, the learned trial magistrate made factual findings on the injuries sustained. He found that from the various documents produced, the plaintiff suffered blunt trauma to lower lumbar region with incontinence (urinary and impotence) and blunt trauma left hip. As correctly submitted by the Respondent on 14<sup>th</sup> June 2013, the plaintiff filed a further list of documents which was duly served on the appellant’s advocates containing copies of the documents complained of by the appellant. It is therefore misleading for the appellant to now complain that the documents were neither filed nor served.

34. Having discounted the first ground of appeal it follows that the second ground which was, in my view, premised on the success of the first ground must similarly fail.

35. In the premises, this appeal is devoid of merit in its entirety. It fails and is dismissed with costs to the Respondent.

36. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 26<sup>th</sup> June, 2019**

**G V ODUNGA**

**JUDGE**

**Delivered the absence of the parties.**

**CA Geoffrey**