



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 443 OF 2012

APEX SECURITY SERVICES LIMITED.....APPELLANT

VERSUS

JOEL ATUTI NYARURI.....RESPONDENT

(Being an Appeal against the judgment and decree of the Honourable R.O Oganyo (Mrs.) Senior Principal Magistrate, Milimani Commercial Courts, made in C.M.C.C No. 4210 of 2010 on 25th July, 2012)

JUDGEMENT

The Respondent was the Plaintiff in CMCC No. 4210 of 2010 who filed a Complaint dated 2nd July, 2010 claiming that sometime on 15th November, 2009 while in the course of employment at P.C.E.A office, Thogoto, he was seriously injured when he was assaulted by thugs. He attributed the accident to the Negligence on the part of the Appellant for failure to take adequate precaution and failing to provide and maintain adequate or suitable appliances to enable the Respondent carry out his duties. As a result, the Respondent averred that he suffered blunt chest injuries, blunt lower back injuries and fracture to the left 5th metatarsal base. The Respondent prayed for general damages, special damages of Kshs. 1,500/=, costs and interests.

The claim was denied by the Appellant who filed a Defence dated 10th August, 2010 and averred that they did not have knowledge of the said accident and if the same occurred, it was caused by the negligence of the Respondent for failure to take the necessary safety precaution and failure to use the protective apparel provided.

The case was heard and a judgment was delivered on 25th July, 2012. The trial magistrate found the Appellant liable for the accident and awarded the Respondent Kshs. 350,000/- in general damages Kshs. 1,500 in special damages and additional Kshs. 5,000/= as doctor's court attendance fees.

Aggrieved by the decision, the Appellant filed this Appeal on the following grounds:-

- (a) The learned Senior Principal Magistrate erred in law and in fact in finding that the Respondent had proved his case on a balance of probabilities against the preponderance of the evidence on record and in disregard of settled principles of law.
- (b) The learned Senior Principal Magistrate erred in law in relying on a questionable medical report and disregarding the Respondent's own admission during cross examination that he had not suffered any fracture.
- (c) The learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the place of doctor's opinion evidence in determination of this case and totally disregarded the law of evidence that expert evidence is a piece of evidence to be considered alongside other evidence on record and is not binding to the court in any way.
- (d) The learned Senior Principal Magistrate erred in law and in fact in failing to make any analysis or evaluation of the evidence on record and by disregarding the Appellant's evidence that he had not suffered any fracture coupled with the fact that hospital records showed that there was no evidence of any fracture or payment for any treatment in respect of the alleged fracture..
- (e) The learned Senior Principal Magistrate erred in law by making an exorbitant award to the Respondent based on an exaggerated medical report notwithstanding the respondent's candid admission that he did not suffer any fracture.
- (f) The learned Senior Principal Magistrate erred in law and in fact in holding that the respondent had proved his claim for special damages contrary to the evidence on record.
- (g) The learned Senior Principal Magistrate erred in law and in fact in denying the Appellant an adjournment to call a witness from

kikuyu Hospital and to have the Respondent undergo a second independent medical examination by another doctor which had already been paid for.

(h) The learned Senior Principal Magistrate erred in law by callously denying the Appellant an adjournment to facilitate a second medical examination by an independent doctor which was necessary in the interest of justice.

(i) The learned Senior Principal Magistrate erred in law and in fact by ignoring the evidence on record and the submissions made by the Respondent thereby failing to dismiss the Respondent's case which had not been proved as required by the law.

During the hearing of the case, the Respondent called three witnesses whereas the Appellant called two witnesses. However, on the first day of day the hearing, the appellant sought adjournment to seek a second medical examination of the respondent by an independent doctor. A ruling was delivered dismissing his application and the hearing therefore commenced.

The Respondent called **DR. C.O OKERE** as the 1st witness (**PW1**) who testified that as a result of the attack, the Respondent sustained blunt injuries to the chest and lower back and fracture of left 5th metatarsal loose bone. He opined that the Respondent sustained injuries on chest, back and left foot with an incapacity of 10% on the foot. On cross –examination PW1 testified that he relied on letter from PCEA Kikuyu Hospital where the respondent was treated and a n X-ray was done but he did not have the x-ray films in court. He could not remember when the x-ray was taken. He denied exaggerating the injuries to assist the Respondent.

The Plaintiff **JOEL ATUTI NYARURI** testified as **PW2** and stated that he was an employee of the Appellant and on 15th November, 2009 he was on duty as a night guard when he was attacked by thieves as a result of which he sustained injuries to the chest, back and leg. He thereafter called one major Kuria his colleague who took him to Kikuyu hospital where he was treated and his foot was bandaged. He testified that the fence surrounding the premises was made of K apple and it had openings from where someone could gain access. He blamed the Appellant for failing to provide him with protective gears.

In cross-examination, he told the court that major Kuria paid all the bills and he was discharged in the morning at 9.00 am and that by the time he left the hospital his leg had been put on a plaster cast. He stated that after discharge they went to the police station and all that time he was walking but with a limp. That he was granted permission, rested for 4 days after which he resumed work and continued to work until he resigned in December, 2009. On further cross examination, PW2 stated that he did not have documents to show when the plaster was removed, he could not recall the date of removal of the plaster cast and he did not have receipts for that. He contended that he was x-rayed the same day he went to hospital but he had lost the X-ray films. PW2 also stated that he never got fractured on any bones. In re-examination he however stated that he did not understand what a fracture meant but confirmed that he was injured on the ankle of his left leg.

DR. MAWINGWA GITURI PHILIP, a medical officer from PCEA Kikuyu Hospital testified as **PW3** and told the court that the Respondent was treated at their facility on 25th January, 2010. That the x-ray done confirmed fracture and a crepe bandage was placed on the left metatarsals. In cross examination it was his evidence that he did not prepare the report but the same was prepared by Dr. Chege and that the file was available in the hospital but he didn't have it in court. It was his evidence that before a plaster cast is removed, a repeat x-ray would be conducted and the patient would be charged for the process.

The Appellant called two witnesses **GEORGE KURIA NJOROGI** who testified as **DW1** stated that he was working with the Appellant as the assistant operational manager. That he received a call from the Respondent informing him that he had been attacked by thieves shortly before 4.30 am. Accompanied by a company driver he went to the site. He took him to PCEA Kikuyu hospital where he was treated and the doctor asked him to take him for x-ray which according to him did not show any fracture and at 8 am they left the hospital. From the hospital they went to Kikuyu Police station and the Respondent walked himself to the station. He gave the Respondent 3 days off duty as he was in shock after which he resumed work.

On cross-examination DW1 testified that the company has provided the Respondent with a whistle, bows, arrows and a radio-call handset. He also stated that guards were not issued with helmets and on his head and chest he had not been given any protective devices. No gloves were issued. He did not dispute that the respondent was injured while on duty but wanted the court to confirm the injuries.

DW2, BEN MWANGI MACHARIA, a supervisor with the Appellant testified that when he reported to the Appellant's head office he learnt of the attack and proceeded to PCEA Kikuyu hospital where he met the Respondent and DW1. They then proceeded to Kikuyu Police station and the Respondent walked all through. Afterwards they escorted the Respondent to his home. In cross examination he stated that where the Respondent was working at the material time, the fence could be broken into. He further stated that the Responded did not have a helmet and chest rest.

The Appeal was canvassed by way of written submissions. I have considered the grounds of appeal, the written submissions filed as well as the authorities cited. An appellate court is tasked with re-evaluating the evidence before the lower Court in order to come up with an independent conclusion. In so doing, it will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that *an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.*

On liability, the standard of proof in civil cases is that of balance of probability. In assessing liability, a court of law will normally be guided by the evidence placed before it. From the evidence of all the witnesses in this case, it is not in contention that the said attack happened. What is in contention is whether the respondent suffered the injuries claimed in the plaint.

The Appellant has denied that the Respondent suffered a fracture on the left leg and has submitted that there is no evidence on record to show that he indeed had the said fracture. PW1 and PW3, the doctors who testified told the court that the medical examination showed that the

Respondent had a fracture on the left leg. However, in cross examination PW1 stated that he relied on the x ray films but he did not have the said films in court. PW3 similarly could not produce the x-ray films which showed that the Respondent had a fracture. The Respondent on his part testified that he had lost the X-ray films and that he did not have the receipts he paid to have the plaster cast removed. He could also not remember when the plaster cast was removed. In fact PW3 had testified that before a plaster cast is removed, an additional x-ray is normally carried out. PW2 did not have the said additional X-ray films. Therefore and in the circumstances, and despite the fact that medical doctors PW1 and PW3 testified that PW2 had a fracture, the said experts opinion was not supported by evidence. Their evidence and that of the Plaintiff did not support the fact that he indeed suffered a fracture on his left leg.

On the weight a court of law should attach on expert opinion this court in the case of **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR** held that,

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[11] Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”.⁷ It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.⁹

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.¹² A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]”

The Court of Appeal, in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that *“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”*

I fully concur that expert evidence should not trump all other evidence, that it should not be considered in a vacuum and that same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the court to evaluate complex matter, the said evidence is not compelling on its own.

This Court has considered other evidence being that immediately after the Respondent was treated at the hospital he walked on his own without assistance to the police station, a fact which the respondent admits although he stated that he was limping. PW2 also gave contradicting testimony when he stated that he had an injury on the leg but no fracture which statement he changed on re-examination. Initially he had also testified that he had an injury on the leg which was bandaged but later on testified that the leg was put on a plaster cast. He resumed work after 3 days.

The court has also noted that there were no x-ray images and receipts to show that the Respondent had the said fracture and to show that the fracture was treated by a plaster cast, no receipts to show that the said plaster cast was removed and the Respondent could not remember the dates for removal of the plaster cast. Rather than the medical opinion on PW1 and PW3 nothing else was produced in evidence to support the claim by the Respondent that he suffered a fracture on the leg and therefore, in the absence of such evidence, the opinion of this court being informed by the evidence on record, is that the Respondent did not suffer the said fracture of the leg.

On damages, it is a well-settled principle that the assessment of quantum of damages in a claim for general damages is a discretionary exercise which must be exercised judiciously having regard to the facts of the case within the context of existing legal principles. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

The Appellant did not provide the Respondent with all the protective devices including helmet and chest rest and since he was attacked in the course of his duty, this court finds the Appellant liable for the injuries suffered. The Appellant’s witness told the court that thieves could

gain access through the fence which mean that, the Respondent was left exposed while he undertake his duties as a night watchman at the Appellant's premises. This court therefore find the Appellant fully liable for negligence that led to the attack of the Respondent.

The assessment of general damages is not a mathematical exercise and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. In **Denshire Muteti Wambua vs KPLC Ltd (2013) e KLR** the Court of Appeal observed that “ **further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd vs Bimomo & 2 Others (2004) 2 KLR 101)**”

In this case the Respondent was awarded the sum of Kshs. 350,000/= in general damages which was excessive in the circumstances.

In the case of **MUNZA INVESTMENT COMPANY LIMITED v MAKAU MWONEWA [2012] eKLR** where the claimant sustained blunt injury to the neck, blunt injury to the lower back; blunt injury to the right shoulder; blunt injury to both hands and right leg below the knee and right hip joint the court awarded general damages at Kshs. 160,000/= for injuries suffered in the year 2008.

In **KIWANJANI HARDWARE LTD & another v NICHOLAS MULE MUTINDA [2008] eKLR** the Claimant was awarded Kshs. 150,000/= in general damages for injuries occasioned in an accident which happened in the year 2005. The claimant had suffered blunt injury to the head without loss of consciousness; blunt injury to the neck; blunt injury to the left shoulder and back; blunt injury to the chest; blunt injury to the right forearm; deep penetrating wound on the left leg with cuts and bruises on the same leg.

Therefore, taking into account the extent of the Respondent's injuries, the rate of inflation on the Kenya shilling and in comparison with decided authorities wherein the injuries suffered were more severe, I award the Appellant Kshs. 150,000 in general damages. The award on special damages will not be disturbed.

In the result the appeal partially succeeds to the extent that the award on general damages is set aside and substituted with the sum of Kshs. 150,000/=. Each party shall bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*