



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CIVIL APPEAL NO. 8 OF 2016

B E T W E E N

ROBERT KARANJAAPPELLANT

AND

MATEE SOMBA SUKARESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment of SPM E.G. Nderitu in the SPM's Court in Voi delivered on 21st March 2016. At the same time as filing the Appeal, the Appellant filed a Notice of Motion seeking a stay. By consent the Record of Appeal was filed after some delay on (7/9/2017). The stay was granted by consent.

2. The Learned Trial Magistrate found that the Defendant was liable for the injuries suffered by the Plaintiff. However she found the Plaintiff 20% contributory negligence on the part of the Plaintiff.

By way of quantum she found that the Plaintiff suffered the following injuries:

- a) Fracture of distal radius ulna of left hand proximal to wrist joint
- b) Cut wound measuring approximately 5 x 3cm on the lateral part of the wrist joint
- c) Soft tissue injury to the chest
- d) Soft tissue injury to the left shoulder

3. The Learned Trial Magistrate recorded the variance between the contemporaneous medical evidence in the form of the P3, the x-rays and the Report of Dr. Hanif following examination of the Plaintiff on 11th November 2014, (one year 3 months after the accident) with the medical opinion of Dr Leah Wainaina a doctor employed by Directline Insurance. The latter doctor is said to have testified that she examined the Plaintiff. However she does not specify the date on which the clinical examination took place. The report is dated 26th February 2015 nearly 2 years after the accident. She recognises that the Plaintiff suffered a fracture but did not record any permanent incapacity or disability from the accident. That is in marked contrast to the earlier report of Dr. Hanif who is a General Practitioner. Magistrate was able to observe the Plaintiff and make a decision.

The Appellant's principal complaint is that the Learned Trial Magistrate preferred the evidence of Dr. Hanif to the evidence of Dr. Leah Wainaina. In the Respondent's submissions it is argued that the Appellant's witness although described as a neurosurgeon, does not possess the fundamental requirement of being independent. She cannot therefore be an expert witness. The proceedings show that the Learned Trial Magistrate recorded that she was an employee of the Insurer and not an independent professional, whatever her expertise.

4. The Learned Trial Magistrate had the benefit of observing all the witnesses and evaluating their evidence in light of those observations. The Appellant has failed to point to any errors of principle justifying an interference with that assessment.

The Appellant has not pointed to any facts or matters taken into account that should not have been nor to any facts that should have been but were not.

5. The Appellant's second main challenge comes on the question of quantum. For the purposes of the trial the Defendant relied on only ONE authority. That is an authority from 1988: **Moses Ndegwa Nyambura vs AG HCCC No 1055/1988**, in other words they put forward a

quantum that was nearly 30 years old and therefore rightly considered to be out of date by the Learned Trial Magistrate.

6. The Appellant filed a memorandum of Appeal on 20th April 2016. That is more than 14 days after the Judgment was delivered. The Memorandum of Appeal prays at (c) "That the Appellate Court be pleased to allow the appellants to adduce their evidence: The action identifies only one Defendant. It is unclear who are the rest. The record does not identify any new evidence not previously adduced.

7. In fact what the Appellant now seeks to do is adduce alternative authorities to that which it previously relied upon. There is no reason or explanation put forward for failing to put those authorities before the court previously. The Learned Trial Magistrate made her decision on the basis of the evidence plus legal argument and submissions presented to her. She made her decision.

8. The Defendant having lost, now wishes to change the argument put forward by submitting alternative authorities. They were not relied upon during the trial but the Defendant criticises the Learned Trial Magistrate for not applying them. The argument suggests at some confused thinking on the part of the Defendant's Advocates. Legal argument is presented by lawyers to Judicial Officer. A party cannot expect a Judicial Officer to research authorities to differentiate from the Plaintiffs case in order to assist the Defendant. That is how the adversarial system works.

9. In the circumstances the Appellant has failed to demonstrate any grounds on which the Learned Trial Magistrate erred either in law or in fact in coming to her decision. In so far as she exercised her discretion the Appellant has failed to prove that she did so inappropriately.

In the circumstances the Appeal is dismissed with costs. Leave to execute after 28 days.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 24TH SEPTEMBER 2018 DELIVERED AND SIGNED ON THIS the 26th day of SEPTEMBER 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: N/A

Respondent: Mr Ratemo