



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 85 OF 2016**

**JOHN SHIKUKU KEYA.....APPELLANT**

**VERSUS**

**LUBAO JAGGERY LIMITED.....RESPONDENT**

*(from the judgment and decree of B. Ochieng, C.M, in Kakamega Civil suit No. 385 of 2007 delivered on 28/9/2016).*

**J U D G M E N T**

1. The appellant had sued the respondent in the lower court seeking general and special damages after the appellant was injured in a road traffic accident while travelling in a motor vehicle belonging to the respondent. The appellant was at the time of the accident working for the respondent. Parties recorded consent on liability to the ratio of 80:20 in favour of the appellant. The trial magistrate proceeded to assess the quantum of damages. The learned magistrate held that the appellant had not produced credible documents to prove the injuries sustained consequent to which he dismissed the claim.

2. The appellant was dissatisfied by the decision of the magistrate to dismiss the case. He filed this appeal through the firm of M/S Mahuni & Company Advocates on the grounds that:-

1. The honourable magistrate erred in law and in fact in dismissing the appellant's case in totality whereas the plaintiff had proved its case on a balance of probability.
2. That the honorable magistrate erred in law and in fact in failure to determine the quantum even after parties had entered consent on liability.
3. That the honorable magistrate erred in law and in fact in disregarding the plaintiff's submissions thereof wholly arriving at his decision contrary to law.
4. That the honourable magistrate erred in law and in fact in failure to take into account the issues brought before him which he ought to have considered in arriving at his decision and considering those that he ought not to have considered in arriving at his decision.
5. That the honourable magistrate erred in law and in fact in failure to appreciate the injuries sustained by the plaintiff and proceed to dismiss the plaintiff's case.

3. The appeal was opposed by the respondent through the submissions of their advocates, **E.K. Owinyi & Co. Advocates.**

4. The appeal is on quantum of damages. In his evidence in court the appellant stated that the accident occurred on 17/8/2006. That he sustained injuries on the chest, back and a fractured leg near the hip. He was treated at Kakamega Provincial Hospital. However that he had no evidence of treatment as the company took his treatment notes. The company had also paid his hospital bill. That in 2015 he went for treatment at Kamuchisu Health Centre. In the same year he was seen by Dr. Oketch who prepared his medical report .

5. The report by Dr. Oketch indicated that the doctor saw the appellant on the 3/8/2015 when he prepared the medical report. The doctor stated in his report the appellant did not avail to him treatment record to confirm the injuries sustained. That that the appellant however availed a check x-ray film of the hip ( pelvic)girdle which revealed a united fracture of the upper part of the right femur( intertrochanteric fracture). During the hearing the treatment notes from Kamuchisu Dispensary and the medical report by Dr. Oketch were produced by consent of the parties as exhibits – PEX 2, and DEX 1 respectively. The appellant in his evidence produced a workmen compensation claim form L.O 104 as exhibit, Pex1.

6. This is a first appeal. It is the duty of a first appellate court to re- examine and re – evaluate the evidence adduced at the trial and draw its

own conclusions whilst bearing in mind that it has neither seen nor heard the witnesses testify -**Selle & Another Vs Associates Motor Boat Co. Ltd & others ( 1968) EA 123.**

7. The questions before the court are:

- (i) whether the appellant had proved the injuries sustained.
- (ii) whether the trial court erred in failing to determine the quantum after parties entered consent on liability.

In dismissing the award for quantum the trial magistrate held that documentary medical evidence on the injuries purported to have been diagnosed 10 years later after the accident were of doubtful veracity and could not be relied on by the court.

8. It is to be noted that the parties had recorded consent on liability. They had also recorded consent on production of treatment notes from Kamuchisu Dispensary and the medical report by Dr. Oketch. In fact the medical report was produced as DEX1. Upon the production of the documents in court the trial court made the following order:

‘Consent adopted as order of the court’.

9. The respondent did not call any evidence in the case. The question then is whether the adoption of the treatment medical notes and the report by consent of the parties was an admission of the injuries suffered by the appellant and whether it was proper for the trial court to subsequently question the veracity of the documents produced by consent of the parties.

10. The Court of Appeal in **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR**, delved into the question as to the circumstances that would lead to a consent order or judgment which has been adopted as an order of the court to be varied or set aside. The Court stated that :

*‘The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.*

*Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -*

*"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,*

*This Court in the case of **Brooke Bond Liebig v. Mallya 1975 E.A.** 266 held:-*

*“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”*

*In **Hirani v. Kassam (1952), 19EACA 131**, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:*

*“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”*

It is then clear from this passage the grounds under which a consent order can **be set aside.**

11. The medical report in the instant case was adopted by consent of the parties as the evidence of the respondent. That meant that the respondent agreed with its contents. They cannot thereafter disown the contents of the documents without seeking first to have the consent order set aside. In dismissing the medical reports the trial magistrate was in essence setting aside the consent order of the parties. The learned trial magistrate did not cite fraud, collusion, illegality, mistake etc that would have justified the setting aside of the order. It has to be noted that the appellant stated that the respondent are the ones who had taken away his treatment cards. They had paid his medical bill. They therefore knew the injuries that he had sustained. That must have been the basis of the consent order.

12. In producing the medical report as their own document the respondents were conceding that the appellant had sustained the injuries contained therein. The consent settled the nature of injuries sustained by the appellant. The learned trial magistrate erred in dismissing the claim for the appellant when parties had consented as to the nature of injuries sustained by the appellant. The duty of the magistrate was to assess damages in reliance of the documents that had been placed before him by consent of the parties without questioning their veracity. A fact admitted by consent of the parties required no further proof. I find that the appellant had proved the injuries sustained by production of medical documents. The trial magistrate erred in failing to determine the quantum even after parties had entered consent on liability and produced medical documents by consent. The court will proceed to assess the damages payable.

13. The trial magistrate stated that if he had found for the appellant he would have awarded him general damages to the sum of Kshs. 500,000/-.

14. According to the medical report DEX1, the appellant had sustained the following injuries :-

- blunt injury to the chest
- fracture of the right thigh bone close to the hip joint.

The doctor opined that the appellant had healed from the injuries with no resultant permanent incapacitation.

15. On quantum, the advocates for the appellant relied on the case of **Mwanaisha Ismail Vs James G. Kinuthia , Mombasa HCC No. 314 of 1988** where the plaintiff had sustained comminuted fracture of the right femur and laceration of the chin hospitalized for 22 months and underwent 5 operations for treatment of the fracture of the right femur. The fracture healed with malposition with gross shortening of the right leg. The plaintiff would never be able to walk again and had to result to use of crutches for the rest of his life. Ksh. 440,000/= was awarded in general damages. In consideration of this authority the advocates asked the court to award Kshs.800,000/= in general damages.

16. The advocates for the respondent in the alternative submitted that had the appellant proved his case an award of Kshs. 250,000/- would have been sufficient compensation. They relied on the following authorities:-

17. **Eldoret Steel Mills Limited Vs Elphas Victoria Esipila (2013) Eld HCCA No. 72 of 2006 (2013) eKLR** where the High court upheld an award of Kshs. 300,000/- in a case where the respondent had sustained tenderness and swelling on the right arm, blunt trauma to the right thigh and a sub trochanteric fracture of the right femur. The injuries had healed with a permanent shortening of the lower part of the limb by 2 cm. The degree of permanent incapacity was assessed at 35%.

18. **Bhachu Industries Ltd Vs Peter Kariuki Mutura Nrb HCCA No. 503 of 2009(2015) eKLR** where the High Court upheld an award of Kshs. 300,000/- where the respondent had sustained injury to the chest and thigh and a fractured femur.

19. **TAM(minor suing through her father and next friend JOM V Richard Kirimi Kinoti & Another (2015) eKLR** where the High Court enhanced an award of Kshs. 160,000/- to Kshs 250,000/- where the appellant had sustained bruises and a fracture of the left femur and a metal plate was inserted in the fractured leg.

20. The principles under which an appellate court may interfere with an award made by a lower court were well set out in the case of **Mbogo Vs Shah (1968) EA 1993** where it was held that:

*“ I think it is well settled this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matter which it should have taken into account and consideration and in doing so arrived at a figure which was either inordinately high or low”.*

21. The trial magistrate in the case before the lower court did not cite any authority as to why he would have awarded Kshs. 500,000/=. On the authority cited by the advocates for the respondent I find that though the award was made many years back in 1991, the injuries in that case were far more serious than in the instant case as the plaintiff therein had healed with malposition with gross shortening of the right leg. In the instant case, the appellant had healed with no resultant incapacitation.

22. In the lower court the advocates for the respondent had cited authorities where awards ranging between Kshs. 200,000/- and Kshs. 270,000/= were made. In this appeal they cited more relevant authorities where awards of Kshs. 250,000/= and Kshs. 300,000/ were made. The injuries in two of these cases- **Bachu Industries Ltd Vs Peter Kariuki** and **TAM Vs Richard Kinoti & another** were more or less similar to those sustained by the appellant herein. It appears that the trial magistrate only considered the authority submitted by the appellant and did not consider the authorities submitted by the defence when he said that he would have awarded Kshs. 500,000/= . That figure was in my view inordinately high. I consider an award of Kshs. 300,000/= to be adequate compensation for the injuries suffered.

In the foregoing the appeal is upheld. The judgment of the lower court in dismissing the case is set aside and replaced with a judgment for the appellant against the respondent to the sum of Kshs. 300,000/= subject to the appellant's contributory negligence of 20%.

As the appeal has succeeded, the respondent to bear the costs of the appeal and the costs at the lower court.

**Delivered, dated and signed in open court at Kakamega this 22<sup>nd</sup> day of November,2018.**

**J. NJAGI**

**JUDGE**

In the presence of:

Ashitsa H/B Miss Mahuni .....for appellant

Otsieno .....for respondent

George .....court assistant

Parties

Appellant –absent

Respondent –absent