



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 905 of 2006

JANE GATHONI.....1ST APPELLANT

SHER AGENCIES LIMITED.....2ND APPELLANT

VERSUS

MUSA MIGWI NJINE.....RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed before the Senior Principal Magistrate's Court at Naivasha by Musa Migwi Njine, (hereinafter referred to as the respondent). The respondent sued Jane Gathoni and Sher Agencies Ltd, (hereinafter referred to as 1st and 2nd appellants), seeking to recover general and special damages for personal accident suffered by the respondent as a result of the negligence of the 1st appellant. The 2nd appellant was the employer of the 1st appellant and the respondent therefore held both appellants jointly and severally liable.
2. The appellants filed a joint defence denying the respondent's claim or the particulars of negligence attributed to the 1st appellant. The appellants maintained that they had nothing to do with the treatment given to the respondent and contended that the respondent contributed to his own injuries by being negligent.
3. When the respondent's suit came up for hearing before the Principal magistrate, there was no appearance for the appellant. Hearing therefore proceeded *ex parte*. The respondent testified that he was injected by an unqualified nurse employed by the 2nd appellant and that the injection caused him to suffer paralysis. The respondent produced a treatment card from Nakuru Hospital and a medical report prepared by Dr. Kuria. The respondent also called his wife Faith Wanjira who testified as to how she was called to the clinic and found her husband had lost consciousness and she took him to Nakuru Provincial General Hospital for treatment.
4. In his judgment the trial magistrate found that the respondent had become impotent as a result of the wrong treatment given to him. He found the appellants wholly to blame and awarded the respondent general damages of Kshs.250,000/= based on the treatment notes and the medical report prepared by Dr. Kuria, which were produced in evidence.
5. Being dissatisfied with the judgment, the appellants lodged this appeal raising 2 grounds as follows: -

(i) The learned trial magistrate erred in law in finding that the respondent had proved his case and proceeding to award damages whereas there was no evidence before the court on which any finding of negligence on the part of the appellants and consequently any assessment of damages could be made in light of the provisions of Section 35 of the Evidence Act and the Court of appeal decision in Nyeri Civil Appeal No.243 of 1998 Mohamed Hassan Musa vs Peter M. Mailanyi & another.

(ii) The learned trial magistrate erred in law by proceeding with the hearing of the case *ex parte* when:

(a) There had been no service of the notice of the hearing date on the appellants at their stated address for service;

(b) The evidence on record of the purported service of the said notice on the 2nd appellant by registered post was of irregular service, and

(c) There was no evidence on record of service of the said notice on the 1st appellant whatsoever.

6. At the hearing of the appeal there was no appearance for the respondent and the hearing therefore proceeded *ex parte*. Counsel for the appellants argued only the 1st ground submitting that the trial magistrate was wrong in basing his assessment of damages on the medical report and treatment notes which were produced by a person other than the maker. In support of his submissions counsel relied on *Civil Appeal No.243 of 1998 Mohamed Hassan Musa & Another vs Peter Mailanyi & another*.

7. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. In his evidence the respondent claimed that he was injected by an unqualified nurse and claimed that the nurses were working for the “defendant”. The respondent did not identify the nurse who injected him nor did he state where the injection was done.

8. In his judgment, the trial magistrate stated:

“The plaintiff told court in his evidence and even his wife called as Pw2 that the plaintiff cannot have sexual intercourse with his wife the plaintiff has become impotent as a result of this type of treatment and the plaintiff blames the defendant wholly for the injuries that he suffered...”

My perusal of the lower court record shows that no such allegations were contained in the plaint, nor did the respondent testify to any such fact in his evidence before the trial magistrate, nor did the treatment notes or medical report confirm that the respondent was rendered impotent. The trial magistrate’s finding was therefore not based on any facts before him.

9. Further, in awarding damages the trial magistrate relied on the treatment notes from Nakuru Provincial Hospital and a medical report prepared by Dr. Kuria. It is clear from the record that these documents were produced by the respondent as the makers were not called to testify.

10. I concur with the submissions made by the appellant’s counsel that the admission of these documents without calling the makers was a contravention of Section 35 of the Evidence Act. The trial magistrate was wrong in relying on the documents to assess the quantum of damages. *Civil Appeal No.243 of 1998 Mohamed Hassan Musa & another vs Peter M. Mailanyi & another* is a case in point that the court can only form an opinion on the extent of a plaintiff’s injuries based on the opinion of experts such as doctors and surgeons and the plaintiff is therefore under a duty to summon any such expert who has given an opinion, to court if he wants the court to rely on such opinion in assessing the extent of injuries and quantum of damages.

11. For the above reasons I find that the judgment of the trial magistrate cannot stand as the evidence adduced by the respondent was insufficient to prove his case to the required standard. Accordingly, I allow the appeal, set aside the judgment of the lower court and substitute it thereof with an order dismissing the respondent’s suit.

Those shall be the orders of this court.

Dated and delivered this 18th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Makungu H/B for Mwiti for the appellant

Advocate for the respondent absent