



REPUBLIC OF KENYA



**Bluesky Outsourcing Limited v Kuria (Civil Appeal 186 of 2019)
[2024] KEHC 8119 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 186 OF 2019**

JM OMIDO, J

JULY 4, 2024

BETWEEN

BLUESKY OUTSOURCING LIMITED APPELLANT

AND

ANTHONY NJOROGE KURIA RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. P. Gichohi, Chief Magistrate delivered on 5th November, 2019 in Kiambu CMCC No. 372 of 2016)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. P. Gichohi, Chief Magistrate delivered on 5th November, 2019 in Kiambu CMCC No. 186 of 2019.
2. The Memorandum of Appeal dated 25th November, 2019 sets out the following grounds of appeal:
 - a. That the Learned Trial Magistrate stepped into the litigation arena by ordering parties to file evidentiary material at the point of judgement.
 - b. That the Learned Trial Magistrate erred in law and in principle by validating incredible, incorrect and inaccurate medical reports hence awarding Ksh.483,000/- future medical expenses.
 - c. That the Learned Trial Magistrate awarded an extremely high amount of general damages of Ksh.950,000/- without giving reasons for her departure from her cited case of *Veronica Kangai v John Bundi & another* [2018] eKLR.
 - d. That the manner in which the Learned Trial Magistrate conducted this matter and arrived at a decision was erroneous in law and in principle and against constitutional, statutory and case law in Kenya.



3. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate’s Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
4. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
5. It is instructive from the lower court record that this matter initially had three Defendants – Bluesky Outsourcing Limited, Duncan Njoroge and John Macharia, as the 1st, 2nd and 3rd Defendants respectively. The issue of liability was settled by the parties vide a signed consent filed on 20th April, 2018 and dated 29th March, 2018. The same was adopted on 15th May, 2018 and provided the following terms:

“By consent it is hereby ordered:-

 - a. That judgement on liability be and is hereby entered at 85%:15% as between the Plaintiff and the first Defendant, in favour of the Plaintiff.
 - b. That the medical reports by Dr. Michael Njau dated 19th February, 2018 and by Dr. P. M. Wambugu dated 27th April, 2017, P3 form, treatment cards and notes be produced and admitted in evidence without calling their makers.
 - c. That costs be in the cause.”
6. I note that the medical report referred to in the consent above is dated 9th February, 2018 and not 19th February, 2018, which is an excusable typographical error.
7. The consent order recorded by the parties was concise on the documents that the parties agreed would be produced and admitted in evidence. There is no doubt that the documents that the parties produced and agreed would be admitted in evidence included the following:

On the part of the Respondent:
Dr. Michael Njau’s medical report dated 9th February, 2018.P3 form.Treatment cards and notes.

On the part of the Appellant:
Dr. P.M. Wambugu’s medical report dated 27th April, 2017.
8. As liability was vide the consent resolved between the Plaintiff and the first Defendant, the Plaintiff filed a notice of withdrawal of suit on 9th May, 2018. The said notice is on record but is dated 15th May, 2018 (a date that came after the same had been filed). Nevertheless, the Court endorsed the withdrawal.



9. The record bears it that as the matter proceeded, the Plaintiff filed a chamber summons application dated 2nd August, 2018 in which the substantive prayer sought was for leave to amend the plaint. Vide the ruling delivered on 30th October, 2018, the application was allowed in the following terms:
 - “ 1. The Plaintiff/Applicant does file the amended plaint and accompanying medical report within fourteen (14) days from today.
 2. The costs of the application shall be borne by the Plaintiff.”
10. It would appear that the Plaintiff did not file the amended plaint and accompanying medical report within the fourteen days that the court ordered. That scenario then prompted the plaintiff to file a notice of motion application dated 21st December, 2018 which sought an order for the extension of the time within which the Plaintiff was to file and serve the amended plaint and copy of the medical report. The application was heard and a ruling delivered on 30th April, 2019 from which emanated the following orders:
 - “ 1. The amended plaint and accompanying medical report both annexed to the application dated 21st December, 2018 be and is hereby deemed as duly filed upon payment of requisite fees.
 2. The costs of the application shall be borne by the Plaintiff.”
11. It is to be noted that the documents in the further list of documents dated 2nd May, 2019 that accompanied the amended plaint included another medical report prepared by Dr. J. Mutai dated 24th June, 2018, a receipt of even date for Ksh.3,000/- for the medical report and a letter dated 11th July, 2018. On 16th October, 2019, the Respondent filed another list if documents that he referred to as an “amended further list of documents”. To that list was attached yet another medical report prepared by Dr. Njau dated 11th July, 2018.
12. With that position obtaining, the Defendant filed an amended defence dated 13th June, 2019 March, 2024 and a list of documents dated 16th October, 2019 to which was attached a medical report prepared by Dr. Irum Beg Mirza dated 20th May, 2019.
13. Noteworthy therefore, Dr. Mutai’s medical report dated 24th June, 2018, that of Dr. Njau dated 11th July, 2018 and Dr. Mirza’s dated 20th May, 2019 were not among the documents that the parties had agreed would be produced and admitted in the consent that was earlier filed and adopted on 15th May, 2018.
14. As per the directions of the trial Court, both parties subsequently filed their respective submissions on the basis of the consent on liability and the further term therein that the medical reports by Dr. Michael Njau dated 9th February, 2018 and Dr. P.M. Wambugu dated 27th April, 2017, P3 form, treatment cards and notes be produced and admitted in evidence without calling their makers.
15. The parties having settled the issue of liability, one would have expected that the matter would then be set down for assessment of damages before the lower court. That however was not the case. Instead,



the matter was placed before the trial Court on 15th October, 2019, when the learned Magistrate issued an order as follows:

“ Court: All the parties avail the medical reports and all the documents they have listed in the list of documents and also dated 28th September, 2018 and list dated 2nd May, 2019 to enable the Court finalise the judgement”.

16. The Court went ahead, on the same day and adopted, for the second time, the consent dated 29th March, 2018. As it is not explained why the said consent was adopted for the second time, such adoption was in my view inconsequential as the same order had already been adopted on 15th May, 2018.
17. Judgement in the matter was subsequently delivered on 5th November, 2019. The grounds upon which the Appellant now seeks to upset the judgement may in precis be said to be the following:
 - a. The learned trial Magistrate considered and relied on documents, particularly the medical reports by Dr. Mutai and Dr. Njau dated 24th June, 2018 and 11th July, 2018 respectively lacked credibility, correctness and accuracy.
 - b. The learned trial Magistrate made an award of general damages that was inordinately high.
18. As the parties herein agreed and consented on liability, the issues for determination diffuse into the aspect of quantum of damages.
19. If I understood the matter well, one of the issues that the Appellant complains of is that the learned trial Magistrate erred in law in considering and relying on documents that were not produced as exhibits – the medical reports of Dr. Mutai and Dr. Njau dated 24th June, 2018 and 11th July, 2018 respectively.
20. Where parties in a civil trial produce exhibits by consent, the court has no option but to make the best out of them, even in a situation such as the instant one where no witness testified. It is also trite law that documents filed in court do not become evidence unless produced by the consent of the parties or through (a) competent witness(es) and then subjected to the tests of admissibility by the court.
21. I have stated above that the medical reports that were relied upon by the Respondent prepared by Dr. Mutai and Dr. Njau and the one that was relied upon by the Appellant prepared by Dr. Mirza were not among the documents that the parties had agreed by consent would be produced and admitted. The three reports were also not produced by any witness(es) and were therefore not available for consideration for admission.
22. In that respect, I am in agreement with the Appellant that the trial Magistrate erred in relying on the medical reports of Dr. Mutai and Dr. Njau dated 24th June, 2018 and 11th July, 2018 respectively and that of Dr. Mirza. I say so because from the contents of the judgement of the lower court, the trial Magistrate relied on the three documents to reach her findings on the nature and severity of injuries that the Respondent sustained.
23. Obviously, having relied on documents that were neither produced nor admitted which was contrary to the rules that govern admissibility of evidence, and considering that the injuries therein were obviously more severe than those documented in the medical report of Dr. Njau dated 9th February, 2018 and that of Dr. Wambugu dated 27th April, 2017 (both of which were produced vide the consent that was adopted by the court), the trial court reached a wrong finding of fact on the nature of injuries that the medical reports presented.



24. The Appellant sustained the following injuries as per Dr. Wambugu's medical report dated 27th April, 2017: Blunt trauma left knee and chest. X-rays left knee joint taken then and "reviewed by myself today" does not reveal any bone or joint lesion. No dislocation noted. General condition was good. He walked with a normal gait and unaided. No true shortening of this limb. The knee joint was neither swollen nor deformed. The ligament menisci were intact. Patellar tap test was negative. Achieved a complete range pain free movement. No crepitus.
25. As per Dr. Njau's report dated 9th February, 2018, the injuries that the Respondent sustained were as follows: Injury to the left knee with x-ray showing a head of fibular fracture. He experienced knee pain on the affected side which was worsened by running or lifting a heavy load. On examination: The general appearance of the left knee was normal. There was medial joint line tenderness. Pressure on the lateral side of the knee caused opening of the medial knee joint. Knee range of motion was normal on extension. However, from full extension to flexion, left 0-90 degrees as compared to right which has a range of 0-110 degrees meaning left knee flexion is limited.
26. From the two reports, one will notice that the injuries described in each were drastically different from the other. While Dr. Njau's report indicated that the Respondent sustained injuries that included a fibular fracture with resultant deformity, Dr. Wambugu was emphatic that the Respondent did not sustain any fracture.
27. Noting that no witness testified in this matter, the Court is faced with a difficult challenge in determining the injuries that the Respondent sustained as the two medical reports provide a very wide contrast and/or variance.
28. The only option this court is left with, in the circumstances, is to consider other available evidence that was submitted by the parties, which in this case was the Medical Examination Report, popularly known as P3 form, which was one of the documents produced and admitted by the consent of the parties and whose contents are not challenged herein.
29. The following injuries are stated in the P3 form as having been suffered by the Respondent: Tenderness, swelling and bruises on the left knee. Fracture on the left knee (x-ray showed that). Tenderness and swelling on the left ankle.
30. The injuries listed in the P3 form are more consistent with those recorded by Dr. Njau's report and I will for that reason go by the said report. I will to that end interfere with the findings of the trial court on the injuries that the Appellant sustained and hold that the injuries that he suffered are those indicated in Dr. Njau's report.
31. Notably, it is not without difficulty that I have had to reach that holding. Perhaps the daunting task is better explained in the case of *Shadrack Mathias & another v Agnes Muluki Wambua* [2021] eKLR where the Court, faced with a similar challenge, observed as follows:

"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."



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.”

32. On the issue of quantum, I take guidance from the case of *Kemfro Africa Ltd & Another v A M Lubia & Another* [1982-1988] KAR, where the Court of Appeal held:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

33. There is also the case of *Kigaraari v Aya* [1982-1988] 1KAR 768 where the court held as follows:

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

34. In *Charles Oriwo Odeyo vs Apollo Justus Andabwa & Another* [2017] eKLR the court held:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are;

- (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded, or
- (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler vs Butler* [1984] KLR 225).

The assessment of damages in personal injury cases by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another vs Michael Kariuki Kamau* (2007) eKLR.”



35. The jurisprudence provided by the decisions above is that although the award of damages is within the discretion of the trial court, there are grounds on which an appellate court can interfere with the assessment by the trial court.
36. In the matter before the trial court, the learned Magistrate assessed damages under the various heads as follows:
- General damages for pain and suffering Ksh.950,000/-.
- Special damages Ksh.6,600/-.
- Future medical expenses Ksh.480,000/-.
- Total Ksh.1,436,600/-
- Less 15% contributory negligence Ksh.215,490/-
- Net award Ksh.1,221,110/-
37. With regard to general damages for pain and suffering, I have stated above that the learned trial Magistrate assessed damages for injuries stated in medical reports that were not part of the evidentiary material herein. Thus far, she erred, resulting in an award that was inordinately high.
38. In assessing damages for the Respondent's injuries, I will rely on the authority of *New Nairobi United Services Ltd & another v Kiiru* (Civil Appeal E051 of 2021) [2023] KEHC 22149 (KLR) (12 September 2023) (Judgment) where the Court disturbed an award of the lower court and assessed general damages for pain and suffering at Ksh.450,000/- for injuries comparable to those the Respondent herein sustained. Considering lapse of time and the factor of inflation, I am of the view that Ksh.650,000/- will be fair compensation to the Respondent.
39. As regards special damages, the rule that applies is that the same must be specifically pleaded and proved (see *Equity Bank Limited v Gerald Wang'ombe Thuni* [2015 eKLR]). From the record of the trial court, what was pleaded and proved by way of production of a receipt was the amount of Ksh.3,000/- being payment for the medical report dated 9th February, 2018.
40. Turning to the head of future medical expenses, I note that the same ought not to have been awarded as the trial court relied on the reports that were not produced as exhibits in reaching the award. The award of Ksh.480,000/- is therefore set aside.
41. In the result, I allow the appeal and set aside the trial court's award of general damages of Ksh.950,000/- and substitute it with one of Ksh.650,000/-. The award of special damages of Ksh.6,600/- is set aside and substituted with one of Ksh.3,000/-. The award under the head of future medical expenses of Ksh.480,000/- is set aside and the claim under the head disallowed.
42. The awards herein are subjected to agreed contribution as follows:
- General damages for pain and suffering Ksh.650,000/-
- Less 15% agreed contribution Ksh.97,500/-
- Net award under the head of pain and suffering Ksh.552,500/-
- Special damages Ksh.3,000/-
- Less 15% agreed contribution Ksh.450/-
- Net award under the head of special damages Ksh.2,550/-
43. The Appellant shall have the costs of this appeal.



DELIVERED (VIRTUALLY), DATED & SIGNED THIS 4TH DAY OF JULY, 2024

J.M. OMIDO.

JUDGE

For Appellant: Mr. Njuguna holding brief for Mr. Kahuthu.

For Respondent: Mr. Diro holding brief for Ms. Njenga.

Court Assistant: Ms. Njoroge.

Mr. Diro: I seek 30 days stay of execution to organize for payment.

Mr. Kahuthu (now present): I pray for an order that the security that was deposited be released to us.

Mr. Diro: No objection but I still request for stay of execution to organize for payment of the balance.

Court: The amount deposited as security to be released to the Respondent's Advocates. In respect of the balance, there shall be a stay of execution for 15 days to allow for the Appellant to organize for payment.

J.M. OMIDO.

JUDGE

