Eldoret Express Ltd v Otako (Civil Appeal 18 of 2021)
[2024] KEHC 9155 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9155 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 18 OF 2021

HM NYAGA, J

JULY 19, 2024

BETWEEN

ELDORET EXPRESS LTD ..... APPELLANT

AND

IMMACULATE ADHIAMBO OTAKO ..... RESPONDENT

(Appeal against judgment and decree on quantum from the Judgment of Hon.J.B. Kalo, Chief Magistrate delivered on 5th May,2019 in Nakuru CMCC No. 1343 of 2015)

JUDGMENT

1. This Appeal arises from a judgment and decree entered in the aforesaid suit whereby the Respondent sued the Appellant for both general and special damages in respect of a road traffic accident in which she sustained personal injuries.

2. The Respondent's case was that the Appellant was the registered and beneficial owner of the Motor Vehicle Registration Number KBK 810 Q. That on or about the 15th September,2013 while lawfully travelling as a passenger, along Nairobi-Nakuru Road in the aforesaid Motor vehicle, the Appellant and or his agent carelessly drove, controlled and/or permitted the said Motor Vehicle to be involved in an accident thereby occasioning her severe injuries.

3. The claim was fully defended and the trial magistrate delivered a judgement on 5th March,2019 in which he found the Appellant 100% liable for the accident and that the Respondent had not established she had sustained the alleged injuries following the accident. Consequently, he awarded only special damages of 9,730/=, costs and interest at court rates to the Respondent.

4. The Appellant are aggrieved with the judgment of the Learned Trial Magistrate on quantum for Special damages only and lodged this appeal vide its Memorandum appeal dated 1st March,2021 setting out the following grounds of appeal:

    I. That the Trial Magistrate erred in law and in fact in awarding the Plaintiff Special damages of Ksh. 9730/= with costs and interest where the plaintiff failed to prove her case on a balance of probability.

    II. That the trial magistrate erred in fact and in law in failing to accord due regard to the Appellant's Submissions on quantum hence arriving at a determination that represents an entirely erroneous principle on award of costs and interest.

    III. That the Learned Trial Magistrate erred and misdirected herself in law and in fact in misapplying the principles applicable to assessment of costs and interest.

5. The appellant urged this court to allow this appeal, set aside and or review the lower court judgment and costs to be borne by the Respondent.

6. In response to the Appeal, the Respondent filed a cross Appeal on 12th March,2021 setting out the following grounds:

    i. That the Learned Trial Magistrate erred in Law and fact by not awarding the Respondent general damages.

    ii. That the Learned Trial Magistrate erred in Law and fact in finding that the Respondent's failure to produce the treatment notes was fatal to her case contrary to the established legal principles.

    iii. That the Learned Trial Magistrate erred in Law and fact in failing to consider the evidence adduced by the Respondent thus arriving at an erroneous finding that the Respondent had failed to prove her case on a balance of probabilities as to the nature of the injuries suffered following the accident therein.

    iv. That the Learned Trial Magistrate erred in Law and fact in disregarding the Respondent's submissions and on all points of fact and law in as far as the award of damages is concerned.

7. The Respondent thus prayed for the Appellant's Appeal to be dismissed with costs to her. In addition, she prayed that the cross appeal to be allowed and the finding of the trial magistrate on quantum and or general damages be set aside and substituted with the Judgement of this Honourable Court.

8. I directed both parties to file their record of Appeal but only the Respondent complied. For this reason, I dismissed the Appellant's Appeal with costs to the respondent/Cross Appellant and directed the cross Appeal to be argued through written submissions.

Cross Appellant's Submissions

9. The respondent/ cross appellant submitted that the trial court erred in finding that failure to produce the treatment notes rendered her case fatal. According to her, her testimony and Doctors testimony, as well the medical report and the P3 form which were produced in evidence proved that she sustained the injuries pleaded.

10. The respondent posited that failure to produce treatment notes was not fatal to her case. To buttress this position, Reference was made to the cases of Beatrice Nthenya Sila Vs Ruth Mbithe Kitsisa & 3 Others [2014] eKLR; Erick Juma & 2 Others V Fredrick Gacheru & Another Ksm CA 120/2013

[2013] eKLR; Charles Maranga Bagwasi & Another vs Kamonjo Muchiri & Another [2000] eKLR; Joseph Munyambu Karega V. Charles Ogollah Obiero [2014] eKLR; Mwanzani Mwakitu –vs- Chandana Industries Co. Ltd (2015) e KLR; & Carzan Flowers (K) Ltd Vs. Edwin Ojiambo [2016] eKLR.

11. The principle running in the above decisions is that non production of treatment notes is not fatal to the Plaintiff's case and the court will take into account the evidence adduced and other medical documents produced in support of the Plaintiff's case.

12. The Respondent submitted that she had prayed for General Damages of Ksh. 400,000/= before the lower court relying on the case of Catherine wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR.

13. She prayed that the cross Appeal be allowed.

Cross- Respondent's Submissions

14. The Appellant/cross respondent submitted that the trial court awarded special damages for medication of Ksh. 3,730/= which were unproven and Ksh. 6,000/= which the Respondent did not incur as the same was paid by her Mother's Insurance.

15. To buttress its submissions, the Respondent made reference to the cases of Hahn V Singh [1985] eKLR where the court held that special damages must not only be claimed but strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act.

16. Also cited was Jackson Onyango Aloo v Jumba Aggrey Idaho and 2 Others [2019] eKLR where the High Court set aside the lower court's holding that the plaintiff's insurer had a right to claim for medical expenses paid under the principle of subrogation but not the plaintiff himself. The High court in allowing the Plaintiff's claim for special damages stated as follows: -

> " we are not even aware of whether or not this Appeal was instituted at the instance of the Appellant or his insurer and this should not concern the court. The fact was admitted so it is not a pleading that has no foundation. With respect, this payment was properly pleaded and having been admitted, no proof was required, and the Appellant was entitled to recover the same. It follows that this Appeal is allowed and that the respondents shall pay the Appellant the said sum of Ksh. 340,515/="

17. Citing the case of Timsales Limited v Patrick King'ori Mwangi [2015] eKLR it was submitted that the Respondent/cross appellant failed to prove her case against it as no evidence was adduced to prove that she sustained injuries.

18. The Appellant thus prayed that its appeal be allowed and the cross appeal dismissed.

Analysis & Determination

19. As I stated earlier the appeal was dismissed for non-compliance with the court's directions. I will deal with the cross appeal, and note that it would still address the issues raised in the appeal.

20. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-

evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

21. In Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR, the Court of Appeal stated that;

> " [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

22. In Peters vs Sunday Post Ltd [1958] EA 424, the Court held that;

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

23. Similarly, in Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

24. With the above in mind, I will now proceed to determine the Appeal.

25. Having considered the record of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are: -

    a. Whether non production of the treatment notes was fatal to the cross Appellant's claim.

    b. Whether the Respondent/cross Appellant is entitled to the damages sought.

26. It was the cross appellant's case that failure to produce the treatment notes was not fatal to her case as she proved her injuries through her testimony and doctor's testimony. She also posited that the medical report and P3 form produced proved she sustained the pleaded injuries.

27. The cross respondent on its part submitted that the cross appellant did not lead any evidence to prove the alleged injuries.

28. I have considered the evidence adduced in the trial court. It is not in dispute that the Respondent did not produce the initial treatment card/notes. She testified that after the accident she was taken to Provincial General Hospital(PGH) where first aid was administered then she was transferred to VIPS Hospital on 16th September,2013. She said she was treated there and discharged. She also stated that x-ray was conducted. She marked the Certificate of attendance and the X-ray report as PMF2 & 3 respectively. It was her further testimony that the piece of paper that she was issued with at PGH got lost.

29. The lower court found that failure to produce the treatment notes was fatal to the Respondent's case. The court placed reliance on the following cases: -

1. *Timsales Limited Vs Wilson Libuya Nakuru HCCA No.135 of 2006* where the court stated that: -

> " Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examines him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether."

2. *East Produce Kenya Ltd Vs James Kipketer Ngetich, Eldoret HCCA No. 85 of 2002* where the court held: -

> " Having revaluated the evidence on record I find that the respondent, did not produce the initial medical chits to show that he had actually been injured and then treated at the appellant's dispensary on the day when he claims to have sustained the injuries. In my mind, lack of such evidence should have raised doubts in the trial Magistrates mind, who should have found that there was no sufficient proof that the respondent was injured while at work as he had alleged."

30. There are also authorities which state that non-production of treatment notes is not fatal. In Comply Industries Limited vs Mburu Simon Mburu, Civil Appeal No.121 of 2005, Maraga J. (as he then was) observed that: -

> " Where a doctor who examines him (complainant) several days or months later makes reference to the treatment card, unless otherwise proved, that would suffice and the production of the treatment card is not necessary. Failure to produce treatment cards is fatal only when the plaintiff fails to prove by other evidence that he was indeed injured and doubt is cast on his injury claim."

31. Similarly, in Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others [2014] eKLR, Kasango J. held: -

> " It is obvious the Learned Magistrate believed the Respondents when they gave evidence on the injuries they suffered. Further the Learned Magistrate received the doctor's evidence about those injuries. And finally the Learned Magistrate must have considered the P3 Form which identified those injured and categorized their injuries. The Learned Magistrate, in view of that cannot be faulted in her judgment."

32. In Amalgamated Sawmills Limited v Joseph Njoroge Matheri [2010] eKLR Emukule J pointed out that there may be circumstances when a treatment card need not be produced, and its absence would not be fatal:

> " Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a Doctor's Report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim."

33. It follows therefore that, each case ought to be determined on its own uniqueness and on its own circumstances.

34. I am persuaded by Aburili J. in George Morara Masitsa v Texplast Industries Limited [2015] eKLR where she held that: -

> " .... it has not been alleged by the respondent that there were more than one and conflicting medical reports produced and without calling their makers and neither are there any glaring inconsistencies between the treatment notes produced, medical report and the testimony by the appellant. ... unlike what is being propounded by the respondent that while medical evidence is entitled to the highest possible regard, the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, and such evidence like other expert evidence must not be rejected except on firm ground."

35. I have perused the evidence touching on the injuries the Respondent sustained. I have noted that the Respondent testified that she was injured as a result of the accident. Though she did not produce the initial treatment notes, she produced an x-ray report dated 16th September 2013, a day after the alleged accident. The P3 form was issued by the police on 25th November 2013 and was filled at the Nakuru PGH Hospital on the same day. A police abstract filled on 26th November 2013 also confirms that the cross appellant was injured. These documents were undoubtedly issued by the police after investigations were done in relation to the accident.

36. Looking at the totality of the evidence and not just a specific issue raised by the trial magistrate, I find that the documents are ample proof, on a balance of probability, that the cross appellant sustained the injuries pleaded in her plaint.

37. The P3 Form stated that the respondent sustained Soft Tissue Injuries of the head, chest, lower back, left elbow, left forearm and left knee.

38. The medical Report on the other hand indicated that the Respondent sustained Severe Soft Tissue injuries of the lower back, Soft tissue injuries of the chest, left elbow joint, left knee joint, Mild head injury and bruises on the forearm. These were the same injuries that the Respondent pleaded in her Plaint.

39. The Appellant did not challenge the production or veracity of the Medical Report and the P3 form. The Respondent did not avail any witness or lead any evidence that would controvert the Respondent's injuries.

40. In the case of Henry Binya Oyala vs Sabera O.Itira [2011]eKLR the court opined that there are many ways of proving injuries sustained in an accident key among them being direct oral testimony of the victim.

41. In the case of Ben Ocharo & Others vs. Kenya Farmers' Co-operative Society Kisii High Court Civil Appeal No.91 of 2006 (UR) the court stated that:

> "...the primary source of information about injuries sustained in an accident if at all is by the victim himself. He will tell the story. Next in line will be ... witnesses of the accident. There may also be people who have an intimate knowledge of the injured person who have lived or worked with him for a reasonably long time who may also have useful information to give of the injuries and his condition. Of course then there are the medical records starting with the treatment notes through to medical reports prepared by the medical

personnel who examined them. However, the information from the victim is valuable and is complementary to the doctor's report. Therefore, whereas the initial treatment records are no doubt of tremendous value they are not the only ones, to prove injuries sustained in a road traffic accident as the learned magistrate tended to think. Such injuries can be proved by word of mouth by the victim himself. Accordingly, a victim's own statement with regard to the injuries should not easily be dismissed merely on the grounds that it was not matched by initial treatment [documents] from the hospital. It is worthy reiterating what Ringera, J. (as he then was) said in the case of Peterson Gutu Ondieki vs. Daniel Gichohi, HCCC No. 4018 of 1990 (UR). He held that non-production of a medical report was not necessarily fatal to a plaintiff's case. That the injuries sustained can be established through oral evidence of the victim..."

42. I'm persuaded by the above authorities and It is my finding that the trial court's erred by overlooking on other evidence adduced in support of the Respondent's claim. The Respondent discharged her burden of proof when she produced her Medical Report which detailed her injuries.

43. I therefore set aside the trial courts's finding that Respondent/cross appellant did not prove that the injuries she suffered.

44. On assessment of the damages for the injuries, I have considered the same.

45. The Court of Appeal in Arrow Car Limited Vs. Elijah Shamalla Bimomo & 2 others [2004] eKLR held that: -

> "It is our view that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases"

46. In the lower court, the Respondent/cross appellant prayed for Ksh. 400,000/= as General Damages relying on the case of Nyeri High Court Civil Case No. 320 of 1998: Catherine Wanjiru King'ori & 3 Others vs. Gibson Theuri Gichubi in which Hon. Khamoni, J. awarded the sum of Kshs. 350,000 on 1 July 2005 for multiple soft tissue injuries.

47. In assessing general damages, the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. I have considered the authority by the Respondent and also the following authorities: -

    1. Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] eKLR where the High Court reviewed downwards an award of Kshs. 250,000/ to Kshs. 150,000/= for "moderate soft tissue injuries that were expected to heal in eight months' time.

    2. George Kinyanjui T/A Climax Coaches & Anor. v Hussein Mahad Kuyale [2016] eKLR, the High Court reviewed downwards an award of Kshs. 650,000/= to Kshs. 109,890/= for soft tissue injuries.

    3. Dickson Ndungu Kirembe v Theresia Atieno & 4 Others [2014] eKLR the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,500= for soft tissue injuries which healed with no complications.

    4. Francis Ndungu Wambui & 2 others v Benson Maina Gatia [2019] eKLR the High Court reviewed downwards an award of general damages of Kshs. 400,000 to Kshs. 300,000 for injuries of head injury with loss of consciousness and soft tissue injuries.

5. Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR the Court of Appeal revised downwards an award by the High Court of Kshs. 700,000/= to Kshs. 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.

48. The respondent/cross appellant herein suffered soft tissue injuries. Dr. Kiambaa who examined her classified the degree of injury as "harm".

49. Accordingly, it is my considered view that the award of Kshs 250,000/= is adequate compensation for the Respondent/cross appellant taking into account inflation and time lapse since the cited authorities were decided.

50. Regarding special damages, it is trite law that special damages must be both pleaded and proved, before the award is made.

51. This was reiterated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held: -

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

52. In the instant case, the respondent pleaded for special damages of Ksh.8,700/- but adduced receipts totalling to Ksh. 9730 i.e. Medical expenses Ksh. 3,730/= & Receipt for medical report Ksh.6,000/=. The trial court ought to have awarded Ksh. 8,700/= only being the pleaded amount.

53. Consequently, I find the cross Appeal has merit and I make the following orders: -

1. The lower court's judgement dismissing the Respondent's prayer for General damages is hereby set aside and the same is hereby substituted with an award of General Damages of Ksh. 250,000/=
2. The special damages of KSh.9730/= is hereby set aside and hereby substituted with an award of KShs. 8700/=
3. The Respondent is awarded half the costs of this appeal.
4. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU 19TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of:

C/A Jeniffer

Mr. Wafula for Respondent/Cross-Appellant

Ms. Mwita for Appellant/Cross-Respondent