



**Kinoru v Prime Outdoor Network Limited (Civil Appeal E369 of 2023)
[2024] KEHC 12602 (KLR) (Civ) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12602 (KLR)

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

CIVIL

CIVIL APPEAL E369 OF 2023

RC RUTTO, J

OCTOBER 18, 2024

BETWEEN

BIBIANA WAITHERA KINORU APPELLANT

AND

PRIME OUTDOOR NETWORK LIMITED RESPONDENT

*(Being an appeal from the judgment delivered by Hon. W. Micheni
(CM) on 28th April, 2023 in Nairobi CMCC No. 860 of 2009)*

JUDGMENT

Background

1. This appeal arises from a judgment and decree entered in Nairobi CMCC No.860 of 2009. In the said suit, the Appellant sued for compensation for negligence by the Respondent.
2. The Appellant alleged that on 3rd April 2008, while at Mlango Kubwa Estate, within or along the open-air market road, an advertisement billboard, owned by the Respondent, was suddenly dislodged by strong winds and fell on the Appellant and other victims. Consequently, the Appellant sustained injuries to the head, neck, left shoulder, and upper back.
3. The Appellant sought judgment in the following terms; special damages in the sum of Kshs 1,180/= together with general damages, costs and incidental to the suit, and interest at court rates.
4. In response vide a statement of defence dated 2nd March 2014, the Respondent refuted the claim.
5. This court takes note that, during the pendency of the suit in the lower court, several related suits were filed, including Milimani CMCC Nos. 216, 218, 219, 220, 467, 468, 853, 855, 856, 857, 858, 859, 860, and 863, all of 2009. The test suit being CMCC 218 of 2009, was set out for inter partes hearing and



judgment was delivered by Hon. L. M. Wachira on 16th September 2016. In that suit, the Honourable Court found the Defendant 100% liable for the fall of the billboard and proceeded to assess the award of damages. An appeal was filed against the judgment, but the same was dismissed.

6. Following the above, the trial court in this instant matter adopted the 100% liability finding, leaving only the assessment of damages for the injuries sustained by the Appellant.
7. Upon hearing and considering the evidence of the witness and the submissions filed by both parties, the trial court dismissed the Appellant's plaint filed on 3rd December 2014, on grounds that she had failed to prove the claim for damages.

The Appeal

8. Dissatisfied by the said decision, the appellant filed an amended memorandum of appeal dated 14th September 2023 with four (4) grounds of appeal set out verbatim as follows: - That the trial Court erred both in law and in fact by dismissing the Appellant's suit in that;
 - i. She got and/or allowed herself to be misled by the Respondent in their written submissions that the Appellants injuries as had been indicated in the Medical report (P.3 Form) were three months old prior to the date of the accident on 3/4/2008 when it was clear that as at the time of filing the medical report on 29/7/2008 the doctor had clearly indicated that the injuries were actually three (3) months after the accident.
 - ii. She again got and/or allowed herself to be misled by the Respondent's over reliance on the Appellants treatment notes and/or record and that the Appellant may never had incurred/sustained the injuries when the medical report was on record as a summary of the injuries sustained and it was clear that the police doctor filled the medical report (P3) on the basis of the said treatment note/records at Kenyatta National Hospital.
 - iii. She dismissed the appellants case despite the appellant having fully discharged her duty as provided by Section 107 of the *Evidence Act*, and there was overwhelming evidence on a balance of probabilities which had not at all been controverted by the Respondent who did not even call any evidence and there was already a judgment on liability hence there being enough evidence and/or material as the basis upon which she ought to have assessed damages and decree in favour of the Appellant.
 - iv. She dismissed the Appellants case both on liability and quantum yet with the same set of evidence in terms of liability, date of documentary evidence and nature of injuries she found in favour of the plaintiffs and awarded damages in the brother/sister suits being Milimani CMCC Nos 219, 220 & 858 also 216, 467, 468, 853, 855, 857, 859 all of 2009 vide their judgments dated 16/6/2023 & 13/9/2023.
9. Reasons whereof, the appellant prayed that the appeal be allowed with costs and the judgment of the lower court in Milimani CMCC No. 860 of 2009 dated 28/4/2023 and substitute the same with an order allowing the said Appellant's suit on liability at 100% against the Respondent and award the Appellant general damages of Kshs 200, 000/= as the trial Magistrate had proposed plus costs and interests.
10. The appeal was canvassed by way of written submissions. The Appellant filed her submissions dated 15th May 2024 in support of the Appeal as well as a reply to the Respondent's submissions dated 3rd June 2024. The Respondent filed its submissions dated 28th May 2024 opposing the Appeal.



Appellant's submissions

11. The Appellant addressed all the four grounds of appeal. She submitted that at the hearing on the assessment of damages she produced all relevant documents including the KNH Treatment notes, P3Form, and Abstract from police records. That the Respondent did not call any witnesses or produce any evidence to contradict the Appellant's submissions
12. The Appellant contends that the trial Magistrate realized her error in the impugned judgement hence the reason why in subsequent judgments in the series she ruled in favour of the Plaintiffs awarding them Ksh. 200,000 as general damages. The Appellant, therefore, urges that the judgment be set aside and substituted with a judgment awarding her Kshs 200,000/= as general damages, along with the costs of the suit, similar to the judgments dated 16th June 2023 and 13th September 2023. In urging the court to allow the appeal reference was made to the case of Standard Group Limited v Beatrice Mugure Wanjohi (2019) eKLR.
13. In response to the Respondent's submissions, the Appellant reiterated that the trial court erred by being overly influenced by the Respondent's submissions. However, in the subsequent judgments dated 16th June 2023 and 13th September 2023 in related cases, the trial court recognized and corrected this error. This was especially evident by the fact that no evidence was presented by the Respondent at the hearing to rebut the Appellant's evidence.
14. The Appellant further submitted that on 3rd April 2008, she did sustain injuries from the billboard fall, like the others in the series and was first attended to at the estate clinic before she sought medical attention at Kenyatta National Hospital on 25/4/2008.
15. The Appellant submits that all the other injured parties in the related matters were awarded damages along with costs and interest, and they have already been compensated by the Respondent. Therefore, the same outcome should apply in this case.

Respondent's submissions

16. The Respondent submitted that, pursuant to the jurisdiction of the appellate court as outlined in the case of *Emphatus Mwangi v Duncan Mwangi Wambugu* [1984] eKLR, this court has a legal obligation to uphold the factual and evidentiary findings of the lower court unless it is determined that the trial court was in error.
17. The Respondent submitted on the following issues namely; whether the Appellant established the claim for general damages; whether the Appellant has demonstrated any reason for this court to depart from the decision of the trial court and whether the Appellant has demonstrated any reason for the court to depart from the decision of the trial court.
18. On the first issue, the Respondent while relying on the cases of *Bernard Obembi Akhuba v Municipal Council of Mombasa & Another* [2021] eKLR and *Meru South Cooperative Union Limited v Moses Otando Munaka & Another* [2015] eKLR submitted that general damages must have a basis.
19. It was the Respondent's submission that parties are bound by their pleadings, and that the trial court correctly considered the evidence adduced by the Appellant noted contradictions between the pleadings and the evidence hence arrived at a finding that there was no basis for an award of damages. To buttress this, point the Respondent also relied on the case of *Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule & 3 others* [2014] eKLR, and the case of *Gachagua Sawmills Ltd v Joel Njuguna Kamanga* [2015] eKLR.



20. The Respondent also submitted that while the Appellant claimed to have suffered injuries to her head, neck, left shoulder, and upper part of her back, the medical report produced indicated that she sustained injuries to her right hand and right ankle, with tenderness in her chest and a swollen ankle. The Respondent further argued that the observations regarding the Appellant's head and neck were normal, despite the claim that she was allegedly unconscious. The Respondent disputes the claim that the Appellant remained unconscious from 3rd April 2008 to 25th April 2008, noting that there is no medical report to substantiate this claim.
21. Additionally, the Respondent contended that it was improbable that the injuries could have been sustained "within hours", as suggested by the report, when the report was made twenty days after the accident.
22. The Respondent further points out that the P3 form, was reportedly issued on 3rd April 2008, yet the approximate age of the injuries is noted as three months. Thus, they submitted that if the Appellant was indeed injured on 3rd April 2008, it would be inconsistent for the injuries to be described as having occurred three months prior to the accident.
23. The Respondent further submitted that the failure to have the medical reports produced by their authors diminished their probative value. Reliance was placed on the cases of Raphael Kyalo Mwanza v Bob Morgan Services Limited [2022] eKLR and Theodore Otieno Kambogo v Norwegian People's Aid [2008] eKLR. The Respondent argued that the Appellant's inability to prove the injuries allegedly suffered disqualifies her from claiming general damages. The case of Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another [2000] eKLR was cited in support of this argument.
24. The Respondent submitted that ground 4 of the appeal must fail, as it falsely asserts that the trial court dismissed the claim on both liability and quantum of damages, whereas the record disproves this assertion.
25. The Respondent further argues that the mere fact that the court reached a different conclusion from the other suits does not equate to the court making an erroneous decision. That the trial court, having considered the facts, evidence adduced by the Appellant, and the Appellant's conduct, rightfully concluded that the Appellant had not proven her case to the required standard, despite liability having been determined in the test suit.
26. It was the Respondent's submission that the fact they did not call any witnesses did not relieve the Appellant of the legal burden to prove her claim to the requisite standard, which must be done through cogent evidence. Reference was made to the case of Gibson Ombonya Shiraku v British Airways Plc [2014] eKLR to support this argument.

Analysis and determination

27. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that, unlike the trial court, the appellate court, does not have the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
28. After a careful analysis of the record of appeal and the submissions by parties, I note that the only issue for determination is whether the Appellant had established the claim for general damages.



29. This court notes that during hearing before the trial court, the Appellant adopted her witness statement and further produced documents filed as Plaintiff Exhibits 1 to 3. She stated that she suffered injuries to her head, neck, hands, and shoulders. On cross-examination, the Appellant clarified that she was never unconscious, despite the treatment notes from Kenyatta National Hospital dated 25th April 2008 indicating otherwise. She confirmed that she had not provided any documentation to show that she visited the hospital between 3rd April 2008 and 24th April 2008, since the documents had been lost. She also confirmed that she had not produced the receipt for expenses amounting to Kshs 1,180. The Appellant also relied on the police abstract which confirmed that an accident occurred on 3rd April 2008, for which the Respondent was found liable.
30. It is noted, from the trial Court proceedings, that the trial court observed that the records from Kenyatta National Hospital, (KNH) specifically entry No. 6, reported that the Appellant's head and ankle were normal according to the X-ray. On re-examination, the Appellant stated that she visited KNH three weeks after the injury because she started feeling pain, and she admitted that she did not understand what the doctor had written.
31. Upon perusing the documents on record this court notes that there is no evidence indicating that the Appellant received any medical attention on the day of the incident. The medical records submitted to the court only show that she visited the hospital on 23rd April 2008 while the accident occurred on 3rd April 2008. Further, the medical records, relied upon by the Appellant, that is, records from Kenyatta National Hospital indicate contradicting nature of injuries with those stated in the claim and in evidence. The report indicated that the Appellant complained of injuries to her right hand following an incident that occurred on 23rd April 2008. According to the general observation made on 25th April 2008, it was noted that she was unconscious, her head and neck were normal, but she exhibited tenderness in her chest and slight tenderness of the ankles. The approximate age of the injuries was recorded as three months. While in her claim she stated that she had sustained injuries to the head, neck, left shoulder, and upper back
32. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that: -
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
33. Further, in the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -
- “As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
34. Having reviewed the record, it is undisputed that an accident involving the Respondent's billboard occurred. What is contested is whether the Appellant suffered the alleged injuries as a result of the said accident to warrant an award of general damages.
35. In the present case, I note that despite the accident occurring and numerous persons being injured, it remains unclear whether indeed the Appellant was one of those injured as a result of the said accident and what specific injuries she sustained. The Appellant's testimony is inconsistent with the documentation provided and is not corroborated by any evidence.



36. Moreover, the medical evidence relied upon by the Appellant indicates that the injuries reported appeared to have happened within hours of the report. The report is dated 25th April 2008 and the accident occurred on 3rd April 2008 indicating that the injuries were suffered way after the accident occurred.

37. The trial court in addressing this held as follows;

“The Plaintiff also states that by the time she was going to hospital it was 3 weeks after the occurrence of the injury. The Defendant states that the report purported the age of the injuries to be hours while the report is dated on 25th April 2008. It follows that the evidence is at variance with the pleading and as a consequence, is to be disregarded. The Plaintiff has failed to adduce any evidence to prove she suffered any injuries on 3rd April 2008.

In addition, the Plaintiff produced the documents but the makers of the said documents never appeared before this court. From the foregoing I find that the Plaintiff has failed to proof any claim for damages as the medical report contradicts the testimony granted to the court plus there was no reasonable reason as to why the Plaintiff took that long before reporting to hospital.

In conclusion the plaint filed on the 3rd day of December 2014 be and is hereby dismissed.”

38. This court agrees with the findings of the trial court as set out above. This court’s hands, like those of the trial court, are tied. Applying logic to the situation, it is evident that the Appellant ought to have sought medical attention for the injuries sustained more probably on the day of the accident. It is not enough to just state that the treatment sheets got lost. Further, the injuries should be consistent with those stated on the treatment sheets and the pleadings. Where there is conflicting and contradicting evidence, as in this case, such contradictions must not be disregarded, as any award derived from them would lack any basis.

39. I am guided by the authority cited by the Respondent, in the Court of Appeal case of Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule & 3 others [2014] which cited with approval the case of Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C 91/2002 where the Judge stated that, “..It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleading or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded...”

40. The Appellant also asserts that the trial court made an error and indicated that if she were to award damages, she would have awarded a sum of Kshs 200,000/=. That the Learned Magistrate realized her error in the impugned judgment dated 24th April 2023, which is why, in the subsequent judgments in the series, she ruled in favor of the Plaintiffs. This is further from the truth. I have perused the judgment of the trial court and note that no where did the trial court make an assessment of damages. Infact, the trial court held that the Appellant had failed to proof any claim for damages as the medical report contradicts the testimony granted. The decree is explicit that the Plaint filed on 3rd December 2014 was dismissed.

41. From the forgoing therefore I find no merit in the Appeal and thus I proceed to dismiss the same. Each party to bear its costs of the Appeal.

Orders accordingly

RHODA RUTTO



JUDGE

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant:

