



Munyoki v County Government of Kiambu & another (Civil Appeal E168 of 2021) [2023] KEHC 1956 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E168 OF 2021
MM KASANGO, J
MARCH 17, 2023**

BETWEEN

RAPHAEL KIMWELE MUNYOKI APPELLANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

SIMON MUROKI KIBURI 2ND RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court at Ruiru (P. Nyotah, RM) dated 30th August, 2021 in Civil Case No. 379 of 2020)

JUDGMENT

1. Raphael Kimwele Munyoki, the appellant by his plaint before Ruiru Magistrate's Court, the trial court, sought award of general and special damages occasioned by an accident whereby he was hit by a motor vehicle owned by the 1st respondent while being driven by the 2nd respondent. The trial court awarded appellant Kshs 2,140,000 in general damages. Appellant has challenged the trial court's judgment by his appeal.
2. This is a first appellate court. An appeal before this Court is by way of retrial. The principles that guide this appeal is that this Court must reconsider the evidence, evaluate it and draw its own conclusion. Those principles are applied with the caution that this Court did not see or hear the witnesses as they testified: See the case *Selle & Another Vs Associated Motor Boat Co Ltd & Others* (1968) EA 123.
3. Appellant has presented nine grounds of appeal which raise three issues for determination. Those issues are:-
 - a. Whether the trial court's award for general damages was inordinately low.
 - b. Whether the magistrate erred in failing to award costs of prosthetic leg



- c. Whether the trial court erred in failing to award special damages.

Issue (a)

4. It is trite law that an appellate court will not interfere with a lower court's award on damages unless the lower court acted on wrong principles of law or made an award of damages which is inordinately low or high: See Butt Vs Khan Nairobi Civil Appeal No 40 of 197.
5. Appellant by his pleadings before the trial court stated that he suffered injuries as follows:-Facial swelling extended to rt supraorbita.Facial cosmetic scaring.Miss rt open femure mid ¹/₃ visible proximal fracture wound 4cm.Coagulation profile – pt 15 sec inr-1, 07.K-nail done, debridement.Left Limp (sic) amputation from the knee.
6. The trial court made a finding that the two respondents were 100% liable for the accident with the 1st respondent being vicariously liable. The appellant's evidence was that he was admitted at Kenyatta National Hospital (KNH) for five months. Appellant enumerated the injuries he suffered as set out above. His right leg was amputated. He now walks with the aide of crutches. He said that he needs a prosthetic foot which he estimated would cost Kshs 150,000.
7. The trial court in its judgment when considering the claim for general damages and referring to the pleaded injuries stated:-

“It is unfortunate that no doctor was called to confirm the meaning of some of these terms but of my own knowledge items (d) and (c) cannot be injuries. They are treatment and/or management strategies.”
8. I concur with the above finding. Appellant did not call evidence from a doctor whether oral or in a form of a medical report. Appellant produced in evidence KNH “case/death summary”. The summary adduced in evidence is hand written, then photocopied. It is largely illegible. From what I was able to read I was unable to find that the doctor of KNH stated that the appellant had his leg amputated. The trial was conducted on-line. The trial was conducted online. The trial court therefore could not have observed whether or not the appellant had an amputated leg.
9. The police P3 form produced in evidence by the appellant is dated August 25, 2020. The doctor noted in that form that appellant's right leg was amputated. There is no indication whether the said amputation was from the hip or knee. The appellant in evidence stated it was from the knee.
10. The appellant through his plaint pleaded that it was his left leg that was amputated, not the right as stated in the P3 Form.
11. The trial court awarded appellant Kshs 2,140,000. Appellant has submitted in support of his appeal that that award went against judicial principles because the injuries he suffered were supported by the KNH case summary and further, the defendants did not controvert that evidence.
12. I respond to that submission by stating that the appellant had the burden to prove his claim. The trial court rightly noted that in the absence of a doctor's report (not a hand-written illegible case summary) the court could not determine exactly the nature of the appellant's injuries. The civil burden



of proof was discussed in the case *North End Trading Company Limited (carrying the business under the registered name of) Kenya Refuse Handlers Limited Vs. City Council Of Nairobi* (2019) eKLR viz:-

“ 16. Section 107 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

“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.”

17. It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”

13. Appellant ought to have proved on a balance of probability the injuries he suffered. In other words, appellant ought to have provided evidence which could have led the trial court to be satisfied that he suffered all the injuries pleaded in the plaint. It follows that the authorities relied upon by the appellant both before the trial court and in this appeal do not assist the appellant because the injuries were not proved to the required standard by the appellant. It is because of the above finding and the great misgiving I have whether the appellant at all had his leg amputated that I decline to interfere with the trial court’s award.

Issues (b) and (c)

14. I will consider the above issues together because they are in the nature of special damages. Special damages must not only be specifically pleaded but also strictly proved: See the case of *Hahn v Singh* (1985) KLR 716 Civil Appeal No 42 of 1983.

15. Appellant plead special damages of Kshs 559,442 representing the hospitalization cost but he failed to prove the same. The following is the trial court’s finding on this head:-

“I have perused the documents on record and there is no single receipt for even a single payment towards medical bill or ...

The entries in the KNH individual credit undertaking form are ineligible.”

16. I wholly concur with that holding. Further, appellant did not produce a doctor’s report recommending that he gets prosthetic foot. Appellant testified giving his own estimate of how much prosthetic foot would cost. That is wholly unsatisfactory to prove he required that foot.

17. The inevitable conclusion that I reach is that this appeal is unmerited. The appeal is dismissed with no orders as to costs.

JUDGMENT DATED and DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant :- Mourice/Julia



Instructed by N.W. & Co. Advocates for the Appellant:- Mr. Ndungu

Instructed by County Government of Kiambu for the respondents:- N/A

COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

