



Elakhaya v Peter (Civil Appeal 59 of 2020) [2023] KEHC 19102 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 59 OF 2020**

TA ODERA, J

JUNE 20, 2023

BETWEEN

MARGARET LUSANJI ELAKHAYA APPELLANT

AND

KARORA PETER RESPONDENT

(Being an appeal from the Judgment and Decree of Hon H.M Nyaberi(SPM) delivered at Winam in Senior Principal's Magistrate's Court Case No 54 of 2016 on 14th August 2020)

JUDGMENT

Introduction

1. In his decision of August 14, 2020, the Learned Trial Magistrate, Hon HM Nyaberi, Senior Principal Magistrate, entered Judgment in favour of the Respondent as against the Appellant as follows:-
 - i. That the defendant, driver and/or agent is wholly liable for the accident.
 - ii. That the plaintiff's claim on General Damages is hereby dismissed.
 - iii. The defendant is awarded costs of this suit
2. Being aggrieved by the said decision, on September 11, 2020, the Appellant filed a Memorandum of Appeal dated September 7, 2020. She relied on five (5) grounds of appeal.
3. Her Written Submissions were dated October 3, 2022 and filed on October 12, 2022. The Respondent did not file any Written Submissions despite having been given a chance by this court to do so.
4. The Judgment herein is based on the Appellant's Written Submissions only.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it was whether or not the Appellant proved her claim on general damages.
8. The Appellant reproduced the evidence on trial touching on quantum and submitted that she was not in control of the hospital's administration system and was only bound to rely on the receipt issued to her from the said hospital. She was emphatic that the fact that there were no notes written by the clinician in the hospital's system as regard to her treatment did not mean that she was not treated at the facility but instead showed failure of the hospital's administration system. In that regard, she relied on the cases of *John Kanyangu Njogu v Daniel Kimani Maingi* [2000]eKLR and DT *Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati* [2014]eKLR where the common thread was that when the court is faced with two probabilities, it can only decide the case on a balance of probability if there was evidence to say that one probability was more probable than the other.
9. She further placed reliance on several cases among them the cases of *Eric Juma & 2 Others v Fredrick Gacheru & Another* [2016]eKLR, *James Mburu Njoki vs Richard Kipkorir Langat* [2020]eKLR and *Mwanzani Mwakitu v Chandaria Industries Ltd* [2015]eKLR where the common thread was that absence of treatment notes was not fatal to the appellant's case.
10. Notably, the Appellant testified before the Trial Court that on February 26, 2016, she was travelling as a passenger aboard the Respondent's motor vehicle registration number KCF 836G along Kakamega-Kisumu Road when at Kona Mbaya area, the driver carelessly managed the said motor vehicle that it lost brakes and got out of his control, moved downhill at a very high speed while it was swerving at a zigzag manner before overturning and landing on its left side. She stated that as a result of the said accident she sustained bodily injuries, loss and damage.
11. George Mwita (hereinafter referred to as "PW 2") testified that he was a Clinical Officer at Ahero County Hospital and that on March 1, 2016 he examined the Appellant herein who was a victim of a road traffic accident and had sustained injuries as follows; swollen and painful forehead, pain on neck, back and chest, tender shoulder joints with bruises and bruises on the knee joints. He indicated that he treated her four (4) days after the accident and that he was not supplied with any initial treatment documents but only a receipt which showed that the Appellant had been treated at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) where she was given painkillers and antibiotics. He produced the P3 form as P Exhibit 2
12. No 50139 PC Geoffrey Ndiema (hereinafter referred to as "PW 3") was the investigating officer. He testified that on February 25, 2016 at about 9.30 (sic) he visited a scene of a self-involving road traffic accident which had occurred along Kisumu/Kakamega road at Kona Mbaya area. He stated that the accident involved the subject motor vehicle and its driver was one Mohammed Ambani Amwayi. He



pointed out that the driver lost control of the subject motor vehicle and it landed on the left side. He stated that some of the passengers were injured. He further testified that he sketched the scene, took measurements and towed the said subject motor vehicle to Kondele Police Station where it was inspected. He added that the victims' statements were recorded and were later issued with P3 forms followed by police abstract forms. He listed the names of the victims and the Appellant was one of them. He produced the Police Abstract as P Exhibit 1.

13. Asenath Okeyo Otieno (hereinafter referred to as "DW 1") testified on behalf of the Respondent. She stated that she was a Health Information Officer at JOOTRH and that according to their records, the Appellant presented herself to the hospital and was given an outpatient No 014788/16 but the hospital had no clinical records. She indicated that the reason could be that the Appellant may have been involved in the accident but was not injured and/or she presented herself at the hospital was given a receipt but was not treated. She produced a Letter dated September 29, 2017 as D Exhibit 2 which she indicated the Appellant appeared at No 4 of the List. On cross-examination, she asserted that any patient who came to the hospital seeking any service was issued with a receipt for outpatient as the system was paperless. She confirmed that she had not produced any extract sheet of the patients who visited the hospital on February 26, 2016 nor the accident register book. She confirmed that the receipt produced by the Appellant originated from their hospital and that she was not the examining doctor and could not confirm whether the Appellant saw a doctor on that day.
14. I have perused the Receipt from JOOTRH at page 13 of the record of appeal produced by the Appellant. It clearly indicates the date of February 26, 2016. This is in tandem with her evidence which clearly stated that she was first given treatment at JOOTRH.
15. In my view, even though the treatment notes from JOOTRH were not availed, PW2's evidence answers the concerns of the defence that the Appellant had no injuries. It is clear there were injuries.
16. A P3 form for the Appellant, dated March 1, 2016, indicates that the Appellant was involved in the accident on February 26, 2016. The form is shown to have been filled in at Kisumu East District Hospital.
17. PW 3 confirmed in his testimony that the vehicle was involved in a self-involving accident on February 26, 2016. Although the evidence of DW 1 may suggest that the process in the hospital was inefficient or was not followed in the manner DW 1 would have expected, it does not, in my view, displace or contradict the evidence of the fact of the occurrence of the accident, involvement of appellant in the same and/or of the injuries sustained by the Appellant.
18. Be that as it may, DW 1 did not deny the fact that the receipt produced by the Appellant emanated from their hospital and that her name was No 4 of the Outpatients in their letter produced as D Exhibit 1. There was also no objection to the production of the p3 form.
19. Although in a plethora of decisions among them the case of *Eastern Produce K Ltd v James Kipketer Ngetali* [2005] KLR the courts have stated that lack of evidence of treatment notes should raise doubts in the trial magistrate's mind who should find that there is no sufficient evidence to prove that the plaintiff was injured, and that the plaintiff failed to prove the case on a balance of probability as required, it is this court's considered view that the main evidential object is to ensure that there are no intervening circumstances that may give rise to doubts concerning the occurrence of the alleged injury or as to their nature and extent, and mode of treatment. Nevertheless, the determination as to whether the absence of treatment notes is fatal depends on the circumstances of each case, and whether there is other corroborative evidence of the accident and injuries.



20. 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.”

21. In the present case however, there was no medical report produced but a p3 form which supports the testimony of appellant on the injuries sustained, I find that on a balance of probability, the Appellant was involved in the said accident on February 26, 2016 and that she sustained the injuries as testified by PW 2 and as proven by the P3 form. I am unable to agree with the Trial Court that the absence of the treatment notes from JOOTRH had the effect of making it improbable for the Trial Court to make a finding that on balance, the Appellant suffered the injuries alleged.

22. Having said so, I proceed to award damages on quantum.

23. The Appellant pleaded that she sustained swollen forehead, neck pain, chest pain and bruises on the shoulder joints and knee joints. The P3 form indicated that the said injuries were assessed as degree of “Harm”. Clearly, these were soft tissue injuries. This court had due regard to the following comparable cases:-

- a. In *Godwin Ireri v Francine Gitonga* [2018] eKLR decided in May 2018 the Plaintiff was awarded KShs 90,000/= for injuries involving two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the right knee.
- b. In *Mbati John & Another v China Zhongxing Construction Company Limited and Another* [2016] eKLR decided in February 2016, the plaintiff was awarded KShs 75,000/= for injuries involving blunt trauma to the occipital region of the head, bruises of the right shoulder girdle, blunt trauma to the anterior chest, cut wounds on the lumber region of the back and bruises of the knuckles of the left hand.
- c. In *Mumias Sugar Company Limited vs Julius Abuko Shibia* [2015] eKLR, an award of KShs 100,000 was made in favour of the plaintiff who suffered blunt injury to the neck, blunt injury to the occipital region of the head, blunt injury to the right shoulder, complaints of neck pain on and off with backache.

24. I have considered the injuries sustained by the appellant herein, the ages of the cited cases and the inflation factor. I find that said injuries are comparable to the one sustained by the appellant herein.

25. Accordingly, I find the appeal challenging the Trial Court’s decision justified. In the premises, I allow this appeal, set aside the decision by the trial court and substitute the same with an award of Kshs 110,000/=. This sum shall earn interest at court rates from the date of this judgment.

26. Costs to appellant.

27. Orders accordingly.

T. A. ODERA - JUDGE

20.6.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;



Awuor holding brief for Okoth for Appellant.

No appearance for Respondent.

Court Assistant; Apondi.

T. A. ODERA - JUDGE

20. 6. 2023

