Otieno v Mwea County Medical Centre Ltd & 2 others (Civil Appeal 49 of 2021) [2023] KEHC 22474 (KLR) (15 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 49 OF 2021

SM MOHOCHI, J

SEPTEMBER 15, 2023

BETWEEN

JUDITH AKINYI OTIENO ..... APPELLANT

AND

MWEA COUNTY MEDICAL CENTRE LTD ..... 1ST RESPONDENT

COSMOS GICHOHI ..... 2ND RESPONDENT

KENNEDY WAWERU ..... 3RD RESPONDENT

(Being an appeal from the Judgment of the Honourable J. B. Kalo (Chief Magistrate) delivered on 29thApril, 2021 in Nakuru CMCC No. 874 of 2019)

JUDGMENT

Introduction

1. This Appeal contests the entire judgment by the trial court Vide a plaint dated 15th august, 2019, the Appellant herein sued the Respondents in Nakuru Chief Magistrate's Court Civil Case No. 874 of 2019 – Judith Akinyi Otieno -vs- Commercial Bank of Africa Ltd & 3 Others (the suit), seeking damages on account of injuries allegedly sustained in an alleged road traffic accident involving motor vehicle registration number KCQ 148Z Isuzu FRR lorry (suit vehicle) and motor vehicle registration number KCD 088W Toyota 'Voxy' of which she was a lawful passenger.

2. The Appellant (Then the Plaintiff) instituted a compensation claim damages in the lower court arising from a Road Traffic Accident which occurred on 2nd March 2019.

3. By Consent of the Parties the Suit against the 1st Defendant- Commercial Bank of Africa was withdrawn.

4. Liability was settled by consent of parties in the ratio of 80:20 in Appellant's favour.

5. All documents in support of the Appellant's case were produced by consent of parties herein and without calling the makers thereof.

6. Both parties filed their respective submissions and the trial court delivered its judgment on or about 29th April 2021 dismissing the Appellant's claim on General damages while allowing the claim on Special damages.

7. The Appellant being dissatisfied with the said judgment preferred this Appeal, challenging the same and relies on the following grounds:

   I. Whether the learned trial magistrate erred in law and in fact by not properly. as expected and/or dutifully analysing and/or considering the materials/evidence/submissions on record and the applicable principles of law, evidence and/or assessment of damages while arriving at his decision /judgement on amount of general damages/assessment of general?

   II. Whether the Learned trial magistrate erred in law and in fact by enlarging the scope of parties' dispute and not appreciating the ripple/compounding effect of the fact that neither party in their respective submissions disputed the appellant's injuries nor her entitlement to general damages and hence the only issue left for courts determination was assessment of general damages only?

   III. Whether the Learned trial magistrate erred in law and in fact by not finding that the Appellant herein had proved her case to the required standard on both injuries sustained and general damages payable/assessment of general damages?

   IV. Whether the learned trial magistrate erred in law and in fact, by holding/finding that the Appellant had failed to produce any document detailing the injuries she sustained apart from medical legal reports by Dr. Kiamba?

   V. Whether the Learned trial magistrate erred in law and in fact, by visiting the error. mistake. inadvertence, modus operandi and/or failure on the part of the hospital (s) where the Appellant was treated of issuing her with receipts and or letter detailing her injuries and or treatment as opposed to treatment card?

   VI. Whether the Learned trial magistrate erred in law and in fact by equating the Appellant's case herein with a scenario where no treatment notes were produced at all while arriving at his finding/decision on General damages payable/assessment of general damages?

   VII. Whether the learned trial magistrate erred in law and in fact by attaching less/no weight disregarding and or drawing a negative inference on the appellant's documents in proof of injuries sustained and thereby reaching a finding similar to one where no treatment notes are produced at all.

   VIII. Whether the learned trial magistrate erred in law and in fact by holding. implying and/or suggesting that the decision as to what injuries the appellant suffered was a matter to be determined/decided by the hospital as opposed to the court which was hearing the case? And

   IX. Whether the learned trial magistrate's erred in law and in fact, in rendering/writing a judgement that is not based on proper evaluation and consideration of the pleadings. evidence on record, issued for determination, submissions and the applicable law, evidence and principles for award of damages?

8. In Dismissing the Appellant's Claim for general damages for injuries sustained, the learned trial magistrate held that;

> " To enable the court, make a determination on general damages, the Plaintiff was required to produce the initial treatment notes detailing the injuries sustained. She did not, instead she produced a letter from the Nairobi Women's Hospital which merely stated that she was taken to the hospital after she was involved in a road traffic accident at Ngata area and that she requested to be transferred to Kisumu Hospital. A P3 form was also produced in evidence that seemed to refer to the injuries sustained by the Plaintiff.
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> However, the Plaintiff stated categorically that the P3 form was filled at Nakuru Police Station and nowhere else. She also denied that she went to Nakuru Level Five Hospital for treatment, yet the P3 form is expressed as having been filled at the said Nakuru Level V Hospital. Essentially the Plaintiff disowned the contents of the P3 form, save for Part 1 that was filled by the Officer Commanding Station, Nakuru Police Station. The totality of it all is that the Plaintiff failed to produce any document that detailed the injuries she sustained. The medical report by Dr. Kiamba is not useful in that regard, since it was filled much later after the accident.....The court finds that the Plaintiff has failed to prove the injuries she sustained. No award for general damages can therefore be made."

Appellants Case

9. Appellant opine that the learned trial magistrate erred in law and fact, by not awarding her General Damages for Pain and Sufferingfor the following broad reasons/grounds among others: -

> The Learned trial magistrate erred in law and fact by holding that the Appellant did not produce initial treatment notes or any other document for that matter detailing the injuries that she sustained in the accident herein.

10. That, neither party disputed the fact that the Appellant was injured as a result of the accident herein and taken to Nairobi Women's Hospital where she was treated and a letter from the hospital to that effect was produced by consent of all parties herein as PEXB - 5 The said letter at line 5 thereof (line 10 of each of the said pages) expressly provides that 'She (the Plaintiff) sustained injuries to her head, face and upper limbs. She did not lose consciousness at the time. Wound was sutured. analgesics administered and she requested to be transferred to a Kisumu hospital for further treatment'.

11. The Appellant also urge the court to refer to the payment receipt from Oginga Odinga Hospital at page 25 Line 10 onwards of the record which clearly indicates the management that the Appellant underwent and treatment given and the fact that she was required to return to the said hospital after 7 days for removal of stitches. The fact that the Appellant herein was injured as a result of the accident herein is further buttressed by the bills she incurred at Nairobi Women's Hospital and which are contained at page 26 - 28 of the Record of the Appeal and which shows that the Appellant herein underwent a minor surgery at the hospital, was Sutured, bandaged and given some injections and drugs.

12. Most importantly, the Appellant urge the court to note that all the documents were produced as exhibits by Consent of parties herein and no party in their respective submissions doubted/submitted that the Appellant did not prove injuries that she sustained in the accident herein, The Appellant also urge the court to note that the foregoing documentary evidence as to the injuries that the Appellant herein suffered as a result of the accident herein was in tandem and corroborated by her oral evidence at page 48 of the record of appeal. As such and in view of the foregoing submissions, it also goes without saying that the cases of Fadna Issa Omar and Timsales Ltd cited by the learned trial magistrate

in support of his decision to dismiss the Appellant's claim on general damages for pain and suffering were inapplicable/the circumstances of this case as they relate to circumstances where by a claimant has not produced any treatment notes/record at all, but which was not the case here as the appellant produced documents highlighted hereinabove detailing her injuries and treatment given.

13. Further and or without prejudice to the foregoing, the Appellant also humbly submit that treatment notes are neither mandatory or the one and only way to prove injuries. As such and in appropriate cases, a trial court is obligated and has a duty to consider all other relevant materials/evidence on record before reaching its decision on injuries suffered as opposed to confining itself within the limits of treatment notes only since there are many ways of proving injuries as was held in case of Henry Binya Oyala V Sabera O. Itira [2011] Ekir where this position was buttressed as follows:-

> In striking out the suit on account of the fact that the appellant did not call evidence by way of Dr. Ajuoga testifying, the learned magistrate gravely erred. Upon parties settling by consent the issue of liability, all that the court was being called upon to do was to assess the damages payable. There are many ways of proving injuries sustained in an accident. The evidence of the doctor who examined the victim and or prepared the medical report regarding the nature and extent of such injuries is not mandatory. As I said in the case of Ben Ocharo & Others -vs- Kenya Farmers Co-operative Society, Kisií HCCA No. 91 of 2006 (UR), "...In my judgment, 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, if there were witnesses to 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 tíme who may also have useful information to give about the injuries and his condition. Of course, then there are the medical records starting with the treatment notes through to medical reports prepared by medical personnel who examined them. However, the information from the victim ís valuable and is complimentary to the doctor's report. Therefore, whereas initial treatment records are no doubt of tremendous value they are not the only ones, to prove injuries sustained in a road 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 be easily dismissed merely on the grounds that it was not matched by initial treatment from the hospital. It is worthy reiterating what Ringera J. (as he then was) said in the case of Peterson Gutu Ondieki -VS- Daniel Njigua Gichohi, HCCC No. 4018 of 1990 (UR). He held that non-production of a medical report was not necessarily fatal to a plaintiff case. That the injuries sustained can be established through oral evidence of the victim..."In this case, the appellant testified as to the nature and extent of the injuries he sustained in the accident and was cross- examined by counsel for the respondent. Again following the accident the appellant was issued with P3 form by Kisii Police Station which was later filled by the medical officer of Health, Kisii on 24th August, 2009. The medical officer of health stated in the P3 form that the appellant had sustained a fracture of the right radius and assessed the degree of injury as grievous harm. The P3 form was tendered in evidence. It is instructive that the appellant was not cross-examined on the same. Then there was the police abstract form which too was tendered in evidence. It concluded that the appellant sustained injuries in the accident classified as harm. Finally, the reports by Dr. Ajuoga and that of Dr. Cheruiyot were admitted in evidence by consent of parties. It is instructive again that the report by Dr. Cheruiyot was at the instance and request of the respondent, that being the case it was not necessary that the Appellant Avails Dr. Ajuoga to testify in order to prove the injuries sustained.

See also the case of Timsales Limited v Stanley Njihia Macharia [2016] eKLR where The Court of Appeal sitting at Nakuru considered this issue extensively and in detail delivered itself thus:-

> In our view, only one issue falls for our determination that is learned Judge fell into error when he declined to fault the responder's case for failure to produce the medical treatment chit, which had been marked for identification but was never produced as an exhibit... It is not in dispute that the respondent's treatment card/ chit was only marked for identification and was never produced as an exhibit... In Buds & Blooms Ltd (supra) the major reason for rejecting the claimant's claim was because the letter of dismissal was a forgery coupled with the failure to mark for identification or produce the treatment card. Neither was it ever used in the preparation of any medical report. In Timsales Ltd vs.wilson Libuya, (supra) the claimant lost because the treatment card he attempted to produce in evidence was a forgery. While in Amalgamated Saw Mills Ltd Vs Tabitha Wanjiku (supra), the claimant lost because the injury was neither entered in the employer's injury records, nor in the records of the health facility where the claimant alleged she had been treated. Turning to the authorities cited by the respondent in the Timsales Ltd Vs. Harun Thuo case (supra) the claimant succeeded because the injuries had been verified by the medical doctor who prepared the report. Second, the medical report had been produced by consent. While in the Timsales Limited Vs. Macharia case (supra), the claimant succeeded because the court believed the evidence tendered by the claimant as being truthful; second, the fact of the injury sustained by the claimant had been confirmed by the employer who took him to hospital from the place of the accident; and third, the doctor who assessed the injuries and prepared the medical report had verified those injuries: fourth, there was no contrary evidence to the claimant's case. In the light of the above assessment, the learned Judge cannot be faulted for opining that:-"Where injury is disputed, a treatment card becomes critical to bolster the claimant's words. Failure to produce treatment cards, however; does not always lead to the dismissal of injury claims."... In the circumstance of this appeal, case law assessed above is clear that such a claimant (Industrial injury claim) will stand non suited where the treatment card is either a photocopy or a forgery, a situation that does not apply to the respondent's case. On the other hand such a claimant stands to succeed in his claim where the original treatment card is marked for identification but not produced, in instances where its contents were verified by the medical officer who prepared the medical report and produced such medical report to court either by consent or after cross-examination as the case may be. The respondent's case falls into the second category. Reason being that first the treatment card was indeed marked for identification but not produced for unknown reasons. It was however original. It was not tainted with allegations of forgery. Its contents had been verified by the medical officer who prepared the said report and tendered it in evidence after cross-examination. The medical report produced by the respondent was also not controverted by any other contrary evidence. Second, the learned Judge's decision is not contradictory vis a vis his earlier two decisions for the reason that the reasons given for discounting the treatment cards in the said two cases were distinguishable from the facts in this appeal in that the said two cases one involved forgery, while the other involved lack of a record of any injury

on the claimant sustained at the place of work. Third, it is not true as contended by the appellant that the learned Judge failed to justify what he meant by "other evidence". Existence of other evidence was clearly demonstrated by the testimony of the respondent and production of the medical report filled on the basis of the original treatment card. There is therefore nothing inconsistent or an affront to the principle and doctrine of precedent. The learned Judge was categorical that it is not in all cases that such a treatment card is not produced that a claimant would lose. There is nothing to portray improper administration of justice in the learned Judge's findings. The respondent was right that each case depends on its own facts.

14. The case of Carolyne Indasi Mwonyonyo v Kenya Bus Service Ltd[2012]eklr where the court held as follows;-

> The Doctor who examined the appellant in his report stated that he relied on treatment notes from Kapsabet General Hospital and the Discharge Summary from Kakamega Highway Nursing Home. The Doctor also saw the appellant and in his report it is indicated that the appellant' walked with slight limp. The Black's Law Dictionary defines the term Evidence as:-
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> > " Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducting belief in the minds of the court or jury as to their contention."

15. That it is clear from the above definition, that evidence can be by way of oral, documents or objects. I do find that the trial court erroneously dismissed the appellant's suit for no apparent reasons. The trial's court's suspicions on the injuries sustained by the appellant blinded its objectivity and corrupted its mind. The evidence adduced did prove the appellant's case on a balance of probability and the evidence was sufficient to have found in favour of the Appellant. The oral evidence was sufficient to find in favour of the Appellant.

16. That there is no written rule that injuries suffered by a victim of a road traffic accident must be proved by documentary evidence in form of treatment notes and medical report only or that a plaint cannot be filed until a plaintiff who is a victim of a road accident has had a medical report prepared by a doctor.

17. And lastly, the Appellant relies on the learned treatise The Casebook on Measure of Damages for Bodily Injuries by Richard Kuloba_at Page 3- 5 where it is recorded that:-

> The primary source of information about the injuries sustained by a person is the victim himself. He should tell the tale... The information from the victim is valuable, and may be complementary to a doctor's reports. It should be obvious that while medical reports from treating doctors and hospitals are no doubt of tremendous value, still they may have accidental omissions of some injuries, or they may contain incorrect labelling of the side of the body harmed, or there may be typographical mistakes.
>
> Accordingly, patients' own statements should not be easily dismissed merely on the ground that those statements happen not to match up to the injuries mentioned in a hospital or doctors' report.

18. The Appellant submit that, the trial magistrate ought to have considered all evidence on record with a view to determine what injuries the Appellant suffered, but not to limit herself to the contents/

confines of the initial treatment notes only, as by doing so, the learned trail magistrate fell into an error of presuming that documentary evidence is more superior than oral evidence. This is totally erroneous since both facets of evidence stands at equal footing and both suffices as adequate proof.

19. The Appellant rely on the case of Esther Nyambura Njenga V Carnos Rashid Chepaurengé & Another [20081 Eklr where the court buttressed that oral evidence is as good evidence as documentary evidence and hence suffices to proof a fact:-

> On the first issue the learned trial magistrate rejected the evidence of the deceased's earnings on the ground that no documents were produced in support of the claim. He did not say why he rejected the oral evidence of PW2 and PW3 who were the employers of the deceased who testified that they used to pay him a total of Kshs 18,000/- per month. By that rejection the learned trial magistrate implied that oral evidence is not as good as any other evidence. That is clearly a misdirection. Oral evidence is the testimony of living persons examined in court or before commissioners appointed by the court. It does not always mean words falling from lips of men. It may include signs made by a person who on account of some illness or physical injury is unable to speak. It also includes the evidence of deaf and dumb persons who have sufficient understanding who can testify by signs or through interpreters or by writing if they are literate. Oral evidence if credible is sufficient to prove a fact. It is only where there are contradictions in oral evidence which occurs in most cases that documentary evidence must be looked for in order to see on which side the truth lies...The trial magistrate had therefore no reason to reject their evidence.

20. That Most importantly and assuming for a minute that the letter that the Appellant was given at Nairobi Women Hospital had a defect or any omission for that matter, the learned trial magistrate ought not to have visited the error of the hospital on the Appellant herein more so given the fact that it is in the public domain that any patient who visits a hospital has no control over how the injuries are documented since the obligation to record and document injuries lies entirely with the hospital/ clinician who sees them. This predicament of patients and the relevant duty of hospitals in relation to documentation of information given by patients was retaliated by this very honorable court in the case of Bigot Flowers (K) Limited v David Were [2016] eKLR where The High Court at Nakuru held that:-

> "It is not practical for a patient when seeking treatment to question the treatment card or notes he is given from the institution or even to inquire as to the names and qualifications of the treating officer. The hospital has a duty to make sure that documents given to the patients who attend their institutions for treatment are genuine and the necessary entries in their registers are properly filled. That can never be a duty of a patient. It is not clear why the treatment card was marked for identification by the trial court.
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> It has been held and confirmed in numerous decision that a treatment card or notes is the property of the patient, and as such, he is the right person to produce it as exhibit in court. It will be denial of justice to a party to be asked to go and bring the maker of treatment card from a medical institution when Such party may not even know who in particular treated him. Many a times a record officer from the hospital or clinic would deny existence of such card or records, yet admitting that such card were from the said institution".

21. The Appellant submit that, it is in view of the said predicament of patients when it comes to documentation of their information by hospitals that the learned treatise The Casebook on Measure

of Damages for Bodily Injuries by Richard Kuloba at Page 3-5 buttresses and superimposes that the most crucial evidence when it comes to proof or injuries is that of the victim:-

> " The primary source of information about the injuries sustained by a person is the victim himself. He should tell the tale... The information from the victim is valuable, and may be complementary to a doctor's reports. It should be obvious that while medical reports from treating doctors and hospitals are no doubt of tremendous value, still they may have accidental omissions of some injuries, or they may contain incorrect labelling of the side of the body harmed, or there may be typographical mistakes. Accordingly, patients' own statements should not be easily dismissed merely on the ground that those statements happen not to match up to the injuries mentioned in a hospital or doctors' report".

22. As such and without belaboring the point, the Appellant submit that the learned trial magistrate's finding that the Appellant did not produce initial treatment notes and/or any other document for that matter detailing the injuries that she sustained in the accident herein was erroneous and against the evidence tendered in court by consent of parties and hence the Appellant urges this court to interfere with and/or overturn the said finding.

The Learned trial magistrate erred in law and fact by holding that the Appellant disowned the contents of her P3 Form.

23. The learned trial magistrate in his judgment made a finding to the effect that the Appellant herein disowned contents of her P3 from herein for reasons that she denied that she went to Nakuru Level Five Hospital for treatment and yet the P3 form is expressed as having been filled at the said Nakuru Level Five Hospital. However, and in our humble view, the foregoing finding is erroneous for the following reasons among others;

> Firstly, the Appellant urge the court to note that the P3 Form herein was produced by consent of parties herein and neither party in their respective submissions assailed the same nor submitted that the Appellant disowned the same. As such, this issue arose for the first time in the trial magistrate's judgment.
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> Secondly, the learned trial magistrates seemed to have confused and or misconstrued the evidence on record in so far as Appellant's 'treatment and filling of P3 Form' are Concerned.

24. That the Appellant's evidence at page 48 line 15 onwards was very clear that she was treated at Nairobi Women's Hospital and Oginga Odinga Hospital for the injuries that she sustained in the accident herein and that she never went for treatment at Nakuru PGH. Her evidence to that effect is corroborated and reflected in the medical legal report by Dr. Kiamba at page 60 line 23 onwards of the record of Appeal. As the court will note, the issue of "which hospital the Appellant's P3 Form herein was filled" never arose at all during the hearing of this case and the record will bear us out. The only issue which arose was 'where the Appellant was treated' and the court will take judicial notice that filling of P3 Form' and 'treatment are two very different and distinct things and more so in the circumstances of this case whereby the Appellant was treated immediately after the accident while her P3 from was filled much later more than 3 months after the accident herein. In our humble view, the learned trial magistrate equated Treatment' with 'filling of P3 Form' which are two different things and hence arriving at a wrong finding. As the court will take judicial notice, it is not mandatory and or a requirement that Appellant's P3 Form or any other P3 Form for that matter be filled at the hospital where one was treated and hence the fact that the Appellant was treated in other hospitals whereas her P3 form was filled at PGH Nakuru is in order.

25. As such and without belaboring the point, the Appellant submits that, the learned Trial magistrate's finding that the Appellant therein disowned content her P3 from herein for reason that she denied that she went to Nakuru Level Five Hospital for, treatment and yet the P3 from is expressed as having been filled at the said (Nakuru Level Five Hospital things coupled with the fact the issue of "which hospital the Appellant's P3 Form was erroneous given that that filling of P3 Form' and 'treatment' are two very different herein was filled" never arose at all during the hearing of this case and hence the Appellant urge this honorable court to interfere/overturn the said finding since it is not based on evidence on record. The Appellant rely on the case of Balder Kaur Mann V Robert Bilindi Wekalao [2006] Eklr where the court held that:-

> I have perused the evidence on record. I find no evidence that DWI told DW2 that he knew that respondent was sitting in the back of the lorry. According to DW2. one of the three workers would be left behind together with firewood. He had this to say in evidence:-"One conductor will be left at the field to gather fuel-wood and return with two. One will then be left in town and the other goes back with the driver to the field. When the lorry is full it would be risky for one to sit on the wood-fuel" The finding of the learned magistrate that DW1 gave a conflicting story to DW2 and to court has no basis on the evidence on record. It was an error.

And also the case of Abdimana Abulwahab & another v G S M M(Suing as legal administrator of the Estate of the Late S W N) [2018] eKLR:

> The finding by the trial court that the deceased's monthly income was Shs.20,000/=, is not supported by evidence. As a first appeal court according to Peters v. Sunday post Ltd (1958) EA 424, I am only allowed to interfere with a finding of fact, if, i) It is not supported by evidence or ii) It is contrary to the totality of the evidence produced at trial 10. After re-assessing the entire evidence, I find as a fact that the trial court was not entitled to find that the monthly income of the deceased was shs.20,000/-. After considering the submissions of counsel for the appellants in the light of the court's finding, I find that grounds one and two of the Appellant's memorandum of appeal are meritorious and are hereby allowed.

The Learned trial magistrate erred in law and fact by holding/finding that Dr. Kiamba's medical legal report was not useful in so far as proving injuries that the Appellant herein sustained was concerned.

26. The learned trial magistrate made a finding in his judgement to the effect that Dr. Kiamba's medical legal report (contained at page 60-62 of the record of appeal) was not useful in so far as proving injuries that the Appellant herein sustained was concerned. However, and in our humble view, the said finding was erroneous for the following reasons;

> Firstly, that holding/finding was based on the learned trial magistrates' earlier findings to the effect that the Appellant, failed to produce any document detailing her injuries and that she had disowned her P3 Form but which findings were equally erroneous as Submitted herein before. As such and the learned trial magistrate having disregarded Dr. Kiamba's medical report based on the said erroneous findings, this means that his decision to disregard the said report was equally erroneous.
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> Secondly, the Appellant urged the court to note that the said medical legal report was produced in evidence as PEXB -6 by consent of all parties and neither party I submissions assailed the same nor submitted that it was not useful. Most importantly, we urge the court to note that no other report was produced by the Respondents herein to contradict the same

nor challenge the contents thereof and hence in our humble view, the said report and its Contents remains uncontroverted. In our humble view, this would still be the case even if no treatment notes or any other documents for that matter was produced to back up the contents of Dr .Kiamba's medical report so long as the medical legal report was produced by consent of parties herein and no other report was produced to challenge controvert the same .The Appellant rely on the case of Benson Charles Ochieng & another v Susan Odhiambo Otieno [2013] eKLR where the Court held that:

> The Appellants made the choice not to refer the Respondent to be seen by a doctor of their choice for a second opinion. The only evidence on record is therefore that adduced by the doctor of the Respondent. That medical evidence is uncontroverted.
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> The case of H.Young Construction Company Ltd v Richard Kyule Ndolo [2014] Eklr-
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> > With the parties having by consent produced medical reports as the only evidence upon which the court was to assess General Damages, the Appellant cannot now turn back to state that there are no treatment notes produced to back up the entries made in the medical reports.
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> > See also the case of Dick Omondi Ndiewo TIA Ditech Engineering Service v Cell Care Electronics [2015] eKLR:-
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> > > The evidence of an expert can only be challenged by evidence of another expert. In the Miscellaneous Application No. 427 of 2010 Ali Mohammed Sunkar Vs Diamond Trust Bank (K) Limited, the court observed and I quote: -
> > >
> > > " The Defendant's attempts to resist the Plaintiffs Application by challenging the handwriting experts report. The report can only be challenged by counter expert report, Elizabeth Hinga who is the head of Debt Recovery Unit cannot simply discredit the handwriting experts report without tabling another handwriting report. The Plaintiff has proved that he did not author the bank transfers by his own personal averment and also supported by expert evidence which the Defendant has failed to rebut. There is no issue to go for trial.

27. And lastly the case of Eldoret Express Company Limited v Nandabelwa (Civil Appeal 120 of 2017) [20221 KEHC 3226 (KLR)(5 May 2022):-

> Where there are laid down procedures in the taking of evidence and manner of conducting trial, a trial court is to adhere to the procedure, unless parties' consent to variation of that procedure...The Appellant having consented to the production of the only evidence on record cannot at the appellate stage, seek to impugn its authenticity. In particular, the

> Appellant consented to the production of Plaintiff's Exhibit 3A - the injuries which the Respondent allegedly sustained from the road traffic accident. a Medical Report by Dr. Kiamba. That report described accident which was the subject of the trial. By accepting its production as evidence and producing no alternative version, it was left to the Learned Trial Magistrate to assign probative value to the Report. It was permissible for the Court to conclude, on the basis of that report, that the alleged injuries by the Respondent were, indeed, sustained as a result of the accident. Having consented to the production of the Report, the Appellant cannot go behind it to request the Court not take it into consideration because some background documents used in the preparation of the report had not been made available to Dr. Kiamba. If the Appellant impugned the authenticity of the Report, he should have insisted that the author appears for cross-examination The Appellant agrees that indeed the Respondent was involved in the subject accident and that she sustained injuries, The Appellant's point of difference is that the Respondent did not prove that the injuries were caused by the subject accident and not any other. Even if I was to accept the Appellant's argument that a Consent on liability did not translate in to a consent on the injuries, the Respondent was only required to prove on a balance of probability that she sustained injuries from the subject accident. From the totality of the evidence admitted by consent, the Respondent discharged this duty. There was enough material presented for a reasonable tribunal to conclude that the Respondent sustained the injuries during the subject accident.

28. The Appellant submits that, the Learned trial magistrate erred in law and fact, by holding/finding that medical legal report by Dr. Kiamba was not useful in so far as proving injuries that the Appellant herein sustained was concerned and hence urge this court to overturn and or interfere with the said finding.

29. The fact that both parties herein were able to identify, enumerate and submit on the injuries that the Appellant suffered as captured in their respective submissions contradicts and renders the learned trial magistrate's findings that there was no evidence in respect to Appellant's injuries contradictory, unmerited and without proper basis.

30. That the aforesaid erroneous finding by the learned trial magistrate Suggests/indicates that in all likelihood, he did not consider, evaluate and or apprehend the evidence parties submissions and other materials on record properly, dutifully, diligently and or as expected/required of him which is an error of principle and which entitles this honorable court to interfere with his decision on the award for general damages as was held by The Court of Appeal in the case of Nzuki Isaac Muveke v Francis Niogu Njehia [2021] eKLR:-

> The Court of Appeal is entitled to interfere (with a finding) if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts: thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong.

31. The Appellant submits that, the Appeal herein is meritorious and hence the Appellant urge this honorable court to allow the same and consequently: -

    a. Reverse, vary, review and/or set aside the judgment / decree of the honorable trial Court delivered on or about 29th April 2021;

b. Be pleased to come up with an appropriate and independent determination/ finding in respect to the award for general damages payable/awardable to the Appellant herein Considering all the materials on record and more so parties' submissions at page 69-114 of the record of appeal;

Respondent's Written Submissions

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i. Whether the learned trial magistrate erred in law and in fact, by not properly, as expected and/ or dutifully analysing and or considering the materials/evidence/submissions on record and the applicable principles of law, evidence and/or assessment of damages while arriving at his decision /judgement on amount of general damages/assessment of general damages.

ii. Whether the Learned trial magistrate erred in law and in fact, by enlarging the scope of parties' dispute and not appreciating the ripple/compounding effect of the fact that neither party in their respective submissions disputed the appellant's injuries nor her entitlement to general damages and hence the only issue left for courts determination was assessment of general damages only.

iii. Whether the Learned trial magistrate erred in law and in fact by, not finding that the Appellant herein had proved her case to the required standard on both injuries sustained and general damages payable/assessment of general damages.

iv. Whether the learned trial magistrate erred in law and in fact, by holding/finding that the Appellant had failed to produce any document detailing the injuries she sustained apart from medical legal reports by Dr. Kiamba.

v. Whether the Learned trial magistrate erred in law and in fact, by visiting the error. mistake. inadvertence, modus operandi and/or failure on the part of the hospital (s) where the Appellant was treated of issuing her with receipts and or letter detailing her injuries and or treatment as opposed to treatment card.

vi. Whether the Learned trial magistrate erred in law and in fact, by equating the Appellant's case herein with a scenario where no treatment notes were produced at all while arriving at his finding/decision on General damages payable/assessment of general damages.

vii. Whether the learned trial magistrate erred in law and in fact, by attaching less/no weight disregarding and or drawing a negative inference on the appellant's documents in proof of injuries sustained and thereby reaching a finding similar to one where no treatment notes are produced at all.

viii. Whether the learned trial magistrate erred in law and in fact, by holding, implying and/or suggesting that the decision as to what injuries the appellant suffered was a matter to be determined/decided by the hospital as opposed to the court which was hearing the case and:

ix. Whether the learned trial magistrate's erred in law and in fact, in rendering/writing a judgement that is not based on proper evaluation and consideration of the pleadings. evidence on record, issued for determination, submissions and the applicable law, evidence and principles for award of damages.

33. The Respondent refined the sole issue for consideration of the court to be;

> Whether the learned trial magistrate erred in law and in fact, by not properly as expected and/or dutifully analysing and or considering the materials/evidence/submissions on record

and the applicable principles of law, evidence and/or assessment of damages while arriving at his decision lodgement on amount of general damages/assessment of general damages.

34. That the appellant did not offer any explanation for failure to tender the evidence of the treatment notes. In the absence of such primary evidence and considering that the Appellant confirmed that the P3 form was only filled by the Police Officer, it was impossible for the trial court to make a finding of fact that the Plaintiff had proven the injuries sustained.

35. It is also unbelievable and impractical for the Appellant to suggest in her grounds of appeal that the decision as to what injuries the appellant suffered was a matter to be determined/decided by the court which was hearing the case without the court having to make reference to expert opinion of doctors who examined the Appellant. Such your Lordship is a ridiculous suggestion.

36. The Respondents submitted that, the significance of production of treatment notes in such a case was emphasized by Maraga J (as he then was) in Timsales Limited V Wilson Libuywa Nakuru HCCA No, 135 of 2006 who when considering allegations of injuries sustained held as follows:

> " 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 examined 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."Consequently, the court found that for the aforementioned reasons that the Respondent had failed to prove that he was indeed injured.

37. This position was further buttressed by Mulwa. J in the case of Peter Migiro -vs- Valley Bakery Limited [2015]eKLR, when faced with a similar scenario he stated that :-

> " ..not convinced that the respondent was injured on the 27h December 2002 as no proof of whatever nature was produced. The respondent failed to call witnesses to confirm the same yet he stated that he was working with other employees. He too failed to discharge his burden to prove that he was treated at the company's clinic on the day of the alleged injury before going to St. Peters Clinic next day. Even then, he failed to produce the treatment notes from the said clinic. As I have stated above, the alleged treatment notes were marked for identification and are not filed in the court record. have not seen them at all. These are the same notes that informed the preparation of the Medical Report by Dr. Obed Omuyoma, and upon which the trial court based its assessment of damages, It has been held in different courts that initial treatment notes are so important that without their production, it would be difficult for a court to ascertain if indeed a claimant was indeed injured.".Consequently. the appellate court found that the trial magistrate failed to address his mind to the fact that without production of the initial treatment notes, the fact of an injury and without any other corroboration by way of witnesses, Subsequently. the trial court's judgement was set aside and the appeal allowed dismissing the suit with costs.

38. The Respondent submitted that, none of the medical practitioners who allegedly treated the Appellant were called to adduce any evidence. As such that the Appellant cannot fault the court for failure to prove their case to the required standard in law.

39. Reliance was placed on the case of Alex Kyalo Ngima & 2 others v Kisau Girls Secondary School (Sued through Chairman Board of Governors Kisau Girls Secondary School [2021] eKLR, held as follows;

> " Thus in my view, the appellants should have called at least one person to testify on the medical documents, even if it was the medical practitioner who ultimately filled the P3 form, in order to avoid the pitfall of relying on hearsay evidence.
>
> As it is, the appellants did not call any medical practitioner who dealt with the medical records, to support any of the medical reports relied upon. Such default rendered the medical reports they relied upon to be hearsay evidence, even though the same were produced as exhibits by PWl. Since these documents were challenged even in cross examination, this greatly weakened the Appellants' case. In my view therefore, on the totality of the evidence on record, the appellants did not prove on the balance of probabilities that they suffered injuries in the accident herein, even assuming that they were passengers in the accident bus KAR 535L. On that account, the appeals will not succeed."

40. The Respondents equally sought reference to the case of Bernard Obembi Akhuba v Municipal Council of Mombasa & another [2021] eKLR, where the lower court found that, the Appellant was not injured and no general damages was awarded. On appeal the Appellate court upheld the dismissal of the trial court and held that:

> " In the instant case, I have observed that the Appellant did not produce any evidence before the court to confirm that he suffered any of the injuries mentioned herein by PW1 and himself. The Appellant did not avail any treatment notes or a P3 Form prepared by the health care professional who could have attended to him in 1992, to show that he indeed suffered any injuries. The only evidence available was a report prepared by Dr. Adede, and this was done 17 years later, which the Appellant disputed. In the circumstances, the Appellant thus failed to discharge his burden to show that he suffered injuries and was indeed, treated at Coast General as he alleged in his evidence. It is trite law that he who alleges must prove. (See Sections 107 and 108 of the *Evidence Act*).".

41. The Respondents urged this court to find that, the Appellant did not prove the injuries and to uphold the trial court's judgement. And that, the treatment notes are essential to contextualize and correctly place the date, time, nature and extent of alleged injuries.

Analysis and Determination

42. That this being the first appeal and on QUANTUM ONLY, is by way of a re-trial and the Appellate court is duty bound to re-evaluate and scrutinize the totality of evidence on record in order to draw its own conclusions as was held in the much-celebrated case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123:-

> An 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial iudae's findings of fact if it appears either that he has 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 demeanor of a witness is inconsistent with the evidence in the case generally.

43. As a first appeal court according to Peters v. Sunday post Ltd (1958) EA 424, I am only allowed to interfere with a finding of fact, if, it is not supported by evidence or it is contrary to the totality of the evidence produced at trial.

44. After re-assessing the entire evidence, I find as a fact that the trial court was in error to disregard of the uncontroverted and uncontested documentary evidence in proof of injuries sustained.

45. The Respondent on their part had no qualms submitting on quantum of general damages before the trial court and thus cannot then on appeal turn-round to claim that the injuries were unproven.

46. After considering the submissions of counsel for the Appellant in the light of the court's finding, I find that grounds I-IX of the appellant's memorandum of appeal are meritorious and are hereby allowed.

47. The Learned trial magistrate erred in law and fact by holding/finding that Dr. Kiamba's medical legal report was not useful in so far as proving injuries that the Appellant herein sustained was concerned.

48. The Respondents having consented to the introduction of the only evidence on record cannot at the appellate stage, seek to discredit its authenticity.

49. In particular, the Respondents consented to the production of Pİaintiff's Exhibit 3A -a Medical Report by Dr. Kiamba. That report described the injuries which the Respondent allegedly sustained from the road traffic accident which was the subject of the trial. By accepting its production as once and producing no alternative version, it was left to the Learned Trial Magistrate to assign probative value to the Report. It was permissible for the Court to conclude, on the basis of that report, that the alleged injuries by the Respondent were, indeed, sustained as a result of the accident.

50. The erroneous finding by the learned trial magistrate suggests/indicates that in all likelihood, he did not consider, evaluate and or apprehend the documentary evidence, parties submissions and other materials on record properly, dutifully, diligently and or as expected/required of him which was an error of principle and which entitles this honourable court to interfere with his decision on the award for general damages as was held by The Court of Appeal in the case of Nzuki Isaac Muveke v Francis Njogu Niehia [2021] eKLR:-The Court of Appeal is entitled to interfere (with a finding) if one or more of the following mattes are established:first, that the Judge misdirected himself in law;secondly, that he misapprehended the facts;thirdly, that he took account of or consideration of which he should not have taken account;fourthly, that he failed to take account of or consideration of which he should have taken account;fifthly, that his decision, albeit a discretionary one, is plainly wrong."

51. This court has considered the appeal herein, the evidence before the trial court, the grounds of appeal and the rival submissions by both the appellant and respondents' counsel both before the trial Magistrate and before this court. In my humble view, the only issue for consideration is whether the Appellant Proved the injuries resulting from the alleged accident on a balance of probability?

52. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

53. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    I. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition

of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

II. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

54. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

55. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

56. The question therefore is, whether the Appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the plaintiff was allegedly injured.

57. First and foremost is that, there is no doubt that an accident occurred in which the Appellant was injured. Liability was settled on consent and the Appellant testified and produced without contest Seven (7) Exhibits Constituting Copy of Identity Card Exh-1, Demand Letter Exh-2, Copy of P3 Form Exh-3, Copy of the Letter dated 22nd May 2019 the Nairobi Women Hospital Nakuru CBD Branch Exh 5, Medical-Legal Report dated 19th July 2019 by Dr. Wellington K. Kiamba, Exh-6, Treatment and medical Receipts Exh -7, Copy of the Motor vehicle records, Exh-8.

58. The Court of Appeal in Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR stated:

> "... Since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant..."

59. I am of the Considered View that the Appellant had discharged the burden of proof and proved on a balance of probabilities, that the Respondent's driver was negligent, causing the aforesaid accident and that as a result thereof she sustained injuries. The Consent on liability at the Ratio of 80:20 is indicative of where the blame lay. The Submission by the Respondents before the Trial Magistrate dated 12th February 2021, did not contest or challenge the validity of the evidence in proof of injuries on the part of the Appellant.

60. This Appeal is thus allowed. The decision of the trial magistrate's finding, that the Plaintiff had failed to prove the injuries she sustained, is hereby set aside, and substituted with judgment finding and holding that, the Plaintiff presented unchallenged and uncontroverted evidence of injuries sustained.

61. General damages are hereby assessed at kshs 200,000/- in addition to the Award made by the Trial Magistrate.

62. The award of General damages as awarded will also have interest at court rates, from the date of judgment in the lower court until payment in full.

63. The Respondent to bear the costs of this Appeal.

It is so ordered.

DATED AND DELIVERED AT NAKURU ON THIS 15TH DAY OF SEPTEMBER, 2023.

S. MOHOCHI (JUDGE)

In the Presence of;

Appellant: J Ndungu Njuguna & Co. Advocates

Respondents: Murimi Ndumia Mbago & Muchela Co. Advocates

Ms. Schola C.A