



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 160 OF 2018

CAROLINE CHEPKEMOI CHELULE.....APPELLANT

VERSUS

JOHN KUNG'U..... 1ST RESPONDENT

CHARLES MUTHOKA.....2ND RESPONDENT

(Being an appeal from the judgment/decision of Honourable R. Yator, Senior Resident Magistrate, Molo, delivered on 4th October 2018 in MOLO CMCC NO 251 OF 2016)

JUDGEMENT

1. This appeal stems from an accident that occurred on **20th of August, 2016** involving motor vehicle registration number KAB 442R Toyota Station Wagon and KAH Toyota Corolla along Njoro- Molo road at Kamwango. As a result of the said accident the appellant being lawfully travelling in motor vehicle registration number KAB 442R, sustained serious bodily injuries. The appellant filed a suit against the respondents claiming inter alia general and special damages. The matter proceeded to its conclusion where the court held the respondents 100% liable but declined to award general damages on grounds that the appellant did not produce medical legal report to confirm the said injuries and whether he indeed underwent treatment. Further, the trial magistrate failed to award the appellant the cost of the motor vehicle search as pleaded under the special damages. The appellant's case as result of this was dismissed with costs.

2. Aggrieved by the said judgement, the appellant filed this appeal against the lower courts' Judgement/decision based on the following grounds;

a) THAT the judgment of the trial magistrate is against the law and weight of evidence on record.

b) THAT the Learned Trial magistrate erred in law and in fact in failing to appreciate and find that the Appellant had proved her case on a balance of probability.

c) THAT the learned trial magistrate erred in law and fact in dismissing the appellant's claim on grounds that she had failed to prove her injuries on a balance of probability against the weight of the evidence on record.

d) THAT the learned magistrate erred in law and facts when she maintained that the plaintiff has not proved her case on a balance of probabilities when in actual sense there was no evidence adduced by the defence to controvert that of the plaintiff.

e) THAT the learned Trial Magistrate erred in law and fact when she disregarded medical chits and P3 (medical examination report) produced by consent.

f) THAT the learned trial magistrate misdirected herself in law and fact in not relying on uncontested evidence thereby causing a miscarriage of justice.

g) THAT the learned Trial Magistrate erred both in law and facts when she considered irrelevant facts and arguments not helpful in the plaintiff's case thereby occasioning a miscarriage of justice.

h) THAT the learned Senior Principal Magistrate erred in law and in fact in holding that the Appellant had not proved her claim for special damages contrary to the evidence on record.

i) THAT the conclusion of the trial magistrate on evidence was improper and therefore raises a need to be interfered with by this court.

j) THAT the conclusion of the trial magistrate erred in her appreciation of the law applicable and the evidence adduced in support of the appellant in the circumstances of the case.

3. When the matter came up for hearing the court ordered that the same be canvassed by way of written submissions, where only the appellant complied.

Appellant's Written Submissions

4. The appellant in his submission raised four issues for determination by the court. The first issue being, whether failure by the appellant to file a medical legal report can deny him general damages for the injuries suffered. The appellant submitted that the trial magistrate held the respondents liable successfully and that treatment chit notes including the medical notes and the p3 form were produced by consent. That it was indicated in the said documents that the appellant suffered soft tissue injuries.

5. The appellant submitted further that there was no evidence controverting the same and that the evidence on record showed that the respondents never cross examined on the injuries. The appellant stated that the trial magistrate ought to have awarded her general damages even if it meant a reasonable figure. The appellant in relation to the same draws the court's attention to the following cases; **David Githuu Kuria v Equity Bank (Kenya) Limited & 2 Others [2019] eKLR, J W (a minor) suing through her mother LW as her next friend v Medical Superintendent Malindi District Hospital & 2 others [2018] eKLR and Agnes Moraa Omiti v KAPI Limited [2018] eKLR.**

6. On the second issue, whether a document produced by consent requires the maker to produce it the appellant submitted that there was indeed a medical report which was produced by consent. That had the respondents opposed the same then he would have called its maker. The appellant while placing reliance in the case of **David Chege Ndungu v Robert Macharia & 2 others [2015] eKLR**, submitted that uncontested document can be tendered in evidence without calling the marker.

7. On the third issue, whether the learned magistrate was justified in denying the appellant special damages despite them being pleaded and adduced in evidence the appellant submitted that the motor vehicle search cost of Kshs. 550/= was specifically pleaded thus the same should be awarded to her.

8. In conclusion the appellant urged the court to set aside the decision of the subordinate court denying her general damages and costs of conducting the motor vehicle search. The appellant further urged the court to award her Kshs. 150,000/= being general damages and Kshs. 550/= as special damages.

Analysis and Determination

8. This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA.123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“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 judge'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”.

9. Having carefully perused the proceedings, the judgement, and the record of appeal as a whole including the appellant' submissions I note that the issue of liability is settled. Therefore, one issue falls for determination and that is; **whether the trial magistrate erred in law by failing to the award of quantum.**

10. **PW1 CAROLINE CHEPKEMOI CHELULE**, adopted her plaint as filed and went on to testify that on 20th August 2016 she had gone to Njoro to take her mother Esther Chepkirui to hospital. That thereafter they boarded a private vehicle make Toyota and the same was involved in accident. She testified further that the vehicle they had boarded was being driven slowly due to potholes and that they were being followed by another Toyota which hit theirs from behind. That a result she got injured on the waist, both hands and on the neck. She was treated at Njoro Sub County Hospital and the following documents upon being recalled to the stand were produced by consent in support of her case; Treatment Chit marked as pexb1, P3 form marked as pexb2, Police abstract marked as pexb3, Demand letter pexb4 and Notice to insurance company marked as Pexb5.

11. On cross-examination, she confirmed that she had a National Identity card and the same was refereed to. She testified that she had sat on the back seat on the right side and that their vehicle was hit from behind. She testified further that she saw the vehicle involved after the accident and after both had stopped. She testified that the cause of the accident was not due to potholes as their vehicle had break lights as it was slowing and she could see as the driver put them on. She could however not tell if lights were on or not.

12. Upon re-examination, she testified that her identity card indicated her names as Caroline Chepkemoi Chelule. She confirmed being involved in the accident and prayed that her National Identity card be produced as Exhibit p5 as the same objected to. She confirmed having sat at the right side at the back of the vehicle and that she meant hazards were on and not break lights.

13. The respondents counsel did not call any witness or tender any evidence.

14. Section 35 (b) of the Evidence Act on admissibility of documentary evidence as to facts in issue provides as follows;

“If the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

15. The court in **Valji Jetha Kerai & another v Julius Ombasa Manono & another [2019] eKLR** cited with approval the Court of Appeal decision in **Mohamed Musa & Another vs. Peter M Mailanyi & Another Civil Appeal No. 243 of 1998** expressed itself as follows:

“Under section 35(b) of the Evidence Act the medical report ought to have been produced by the maker thereof. The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendant as well as to the plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court make calculations or to reach a conclusion thereon otherwise the award cannot stand....

In this case the finding of the trial court cannot stand as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases ex parte, the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party.”

16. The same court went on to quote Warsame, J (as he then was) in **Theodore Otieno Kambogo vs. Norwegian People’s Aid Nairobi (Milimani) HCCC NO. 774 of 2000** held:

“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.”

17. I have read the evidence on record and it’s clear that the appellant was duly represented by counsel as well as the respondents. At no one time did the advocate for the respondent’s objected to the production of all the exhibits adduced by the appellant, including the medical documents. The respondents’ advocate consented in court to the production of the said exhibits by the appellant before closing the defence case without calling any witness to the stand. It is therefore my view that there was agreement by the advocates on the production of the documents including the appellant’s documents which was produced by PW1 who was not the maker.

18. In view of the evidence on record and the above cited authorities I find that the said medical records were properly produced and rightfully admitted in evidence. Further, the trial magistrate erred in law by failing to award quantum on the ground that no medical report was produced in court.

19. The appellant is therefore entitled to damages based on the said medical documents which were properly produced and showed that the appellant sustained soft tissue injuries in the form of tenderness on the neck, back and on both hands. The appellant proposed a sum of Kshs. 150,000/=, but I find that an award of Kshs. 100,000/= is reasonable and fair considering the nature of injuries she sustained.

20. In consideration of the above the court in the case of **Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR** awarded general damages for Kshs. 100,000/= for minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. Further, in **Hantex Garments (Epz) Ltd Vs Haron Mwasala Mwakawa [2017] eKLR**, the court upheld an award of Kshs. 100,000/= in a case where the respondent had sustained bruises, blunt trauma, swelling and tenderness on the right leg.

21. I would also award the Kshs. 550/= for motor vehicle search under special damages as the same was pleaded and proved.

22. In conclusion this appeal is hereby allowed as follows;

a) The trials court judgment is hereby set aside.

b) The appellant is hereby awarded general damages of Kshs. 100,000 as well as special damages of Kshs.550.

c) The above sum of Kshs 100,550 shall attract interest at courts rates from the date of lower court’s judgement till payment in full.

d) The appellant shall have the costs of this appeal and at the lower court.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 3RD DAY OF FEBRUARY 2022.

H K CHEMITEI

JUDGE