REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 159 OF 2018

ESTHER CHEPKEMOI NGECHER.....1ST 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 250 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 the grounds that the appellant did not produce medical legal report to confirm the said injuries and whether she indeed underwent treatment. Further, the trial magistrate failed to award the appellant the cost of the motor vehicle searches 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 based on the following grounds;

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

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 learned magistrate erred in her appreciation of the law applicable and the evidence adduced in supporting 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, whereby only the appellant has complied.

Appellant's Written Submissions

4. The appellant in her 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 report (p3 form) were produced by consent. That it was marked that the appellant suffered soft tissue injuries. 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.

5. 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 marker. 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 shs. 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, in my view one issue falls for determination and that is; **whether the trial magistrate erred in law by failing to the award of quantum.**

10. PW1 Esther Chepkemoi Ngecher testified that on material date on 20th August 2016 she was from a hospital in Njoro together with her daughter Caroline Chepkemoi. On returning they boarded a private vehicle which registration number she did not know as she had sat at the front seat. That another vehicle hit their vehicle from behind upon which she was injured on the ear, chest, left leg and taken to Njoro sub county hospital. That as she was unwell, her daughter went to report at the police and collected P3 form for her. The following documents were produced by consent in support of her case; National identity card marked as pexb1, Treatment Chit marked as pexb2, Demand letter pexb3, copy of records marked as pexb4, Notice to insurance company marked as Pexb5 and Police abstract marked as pexb6.

11. On cross-examination, she confirmed having sat at the front, therefore she could not see the vehicle that hit theirs. She stated that the said vehicle was to blame for the accident. That she heard the impact outside the vehicle and she could not tell what happened later.

12. The defence counsel did not call any witness or evidence and therefore the defendants case was closed at this point.

13. **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."**

14. The court in **Valji Jetha Kerai & another v Julius Ombasa Manono & another [2019] eKLR** cited with approval the Court of Appeal decision in of **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....**
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> **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."**

15. 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."**

16. However, in **Faith Mumbua Kiio v Patel Devika [2018] eKLR** the court cited with approval the case of **David Ndung'u Macharia v. Samuel K. Muturi & another, Nairobi HCCC No. 125 of 1989** where Ringera J. (*as he then was*) held as follows:

> **"The second issue is that it is only an agreed report that can properly be admitted without calling the maker. The mere exchange of medical reports does not render such report or admissible without calling the maker(s) unless one or both of them have been agreed."**

17. I have read the evidence on record. The appellant was duly represented by counsel as well as the respondents. At no one time did the advocate for the respondent's object to the production of all the exhibits adduced by the appellant, including the medical report. The respondents' advocate consented in court the production of the said exhibits by the appellant before closing the defense's case without calling any witness to the stand. It is therefore find that their consensus by the advocates on the production of the documents including the appellant's documents which were produced by PW1 who was not the maker.

18. In view of the evidence on record and the above cited authorities i hold that the said medical records were properly produced and rightfully admitted in evidence. On the same vein this court finds that the trial magistrate erred in law by failing to award quantum on the ground that no medical report was produced in court. The production of the treatment notes from Njoro sub county hospital and the p3 form are sufficient to indicate that indeed the appellant was injured. The absence of a medical legal report notwithstanding does not oust the fact that the appellant sustained injuries in the said accident.

19. I shall therefore proceed to award quantum of damages to the appellant based on the said medical documents which shows that the appellant sustained soft tissue injuries. The appellant proposed Kshs. 150,000/=. I however find that an award of Kshs. 125,000/= is reasonable and fair considering that the appellant was treated and recovered fully. I am guided by the court's decision in the case of **Maimuna Kilungya v Motrex Transporters Ltd [2019] eKLR** where the court held as follows: -

> **"…The Appellant was examined way back on 13th October, 2014 and PW3 stated that she would recover fully. I am convinced she has fully recovered as her injuries were of a soft tissue nature. I find that an award of Kshs. 125,000/= is reasonable and fair."**

20. I would also award the Kshs. 550/= for special damages pleaded and proved.

21. In the premises the appeal is allowed as hereunder;

> **a. The trial court's judgement dismissing the appellant's suit is hereby set aside.**
>
> **b. The appellant is hereby awarded general damages of Kshs.125000**

c. Special damages of kshs.550.

d. The total sum of Kshs 125,550 shall attract interest from the date of the trials court's judgement till payment in full.

e. The appellant shall have the costs of this appeal as well as those at the lower court.

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

H K CHEMITEI

JUDGE