



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CIVIL APPEAL NO.115 OF 2015**

**BERNARD BISONGA SUNGURA.....1<sup>ST</sup> APPELLANT**

**DAIMA CONNECTIONS LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HARRISON OGENDO OPIYO.....RESPONDENT**

*( Being an appeal from the judgment of the Honorable Mwinzi (SRM) delivered on the 25<sup>th</sup> August 2015 in Naivasha CMCC No 728 of 2013)*

**JUDGMENT**

**Background**

1. This is an appeal against the quantum of general damages awarded in the lower court which amounted to Kshs 1,200,000/=. With liability agreed at 90:10% in favour of the plaintiff, the final amount awarded was Kshs 1,080,000/=. The accident occurred on 23-10-2012 around Suswa area, and liability is not in issue.
2. The appellant did not file submissions, the respondent filed a supplementary record of appeal and written submissions.
3. At the hearing in the lower court, the only evidence availed was that of the plaintiff who testified as PW1 and produced PExhibits 1-5. From the proceedings, it also appears that the plaintiff produced DExhibit 1, a second medical report. The defence closed its case with no evidence adduced.
4. The only issue in the appeal is whether the injuries allegedly suffered were as serious as made out by the plaintiff and attract the damages awarded.
5. The plaint at paragraph 6 sets out the injuries allegedly sustained –which are denied in the defence – as follows:
  - a) Head injury with fracture of the skull at the occipital region and deep cut wound on scalp with brain damage;
  - b) Damage of left ear;
  - c) Dislocation of cervical spine of the neck: subluxation of cervical spine C2-C5;
  - d) Dislocation of left shoulder joint;
  - e) Blunt chest injury;
  - f) Severe damage of the abdomen with ruptured bladder and tear of inner abdominal viscera;
  - g) Dislocation of lumbar sacral spine
  - h) Fracture of the right tibia fibula

6. PExhibit 1, the plaintiff's medical report by Dr Manasseh Onyimbi is dated 24<sup>th</sup> May, 2013, seven months after the accident, and it mirrors the injuries in the plaint. PExhibit 2 contains medical treatment notes from: Naivasha District Hospital dated 23/10/2012; Kenyatta national Hospital dated 25/10/2012 with discharge date of 4/12/2012; and St Joseph's Hospital Nyabondo dated 6/12/2013 and discharge four days later.

7. All the medical notes are written in medical language in handwriting and cannot be easily understood without an explanation. Those parts that are legible, however, include that amongst the conditions for which the respondent was treated at Naivasha District Hospital are those named in the diagnosis section as: cervical spine dislocation/ compression and the patient was referred to Kenyatta Hospital. Diagnosis at Kenyatta Hospital included subluxation C2-5 and tibial fracture. The only part I can read in respect of the Discharge summary from St Joseph's Hospital Nyabondo is the Examination findings which shows urinalysis. Receipts from Kenyatta Hospital show, inter alia, aluminium crutches, x-rays of chest, lumbar spine pelvis and a scan.

8. On the other hand, DExhibit 1 is a report by Dr Jenipher Kahuthu dated 25/4/2015, three years after the accident. It shows that the respondent was treated for subluxation C2-C5 and tibial fracture. On examination, the doctor found the respondent had healed with normal walking gait, but had neck pain, head flexion and extension and on prolonged walking. Scars on right leg had healed and an old fracture had healed. On scan and examination, the doctor reports that *"Initial (scan)-not availed"*.

9. Dr Kahuthu further commented on Dr Onyimbi's report as follows:

***"Dr Manasseh Onyimbi in the medical report dated 24/5/2013 says that the claimant suffered damage to the left ear, dislocation of the left shoulder, severe damage [to] the abdomen with ruptured bladder and tear on the inner abdominal viscera. All these are not mentioned in the treatment notes"***

The doctor's recommendation is that: ***"He [claimant] sustained tibial fracture and subluxation of C2-C5"***.

10. It is on the strength of the report by Dr Kahuthu that the appellant challenges the award of damages as being too high. However, I note that the DExhibit 1 produced by the plaintiff was part of the Defendant's List of documents. The appellant did not however bother to produce that medical report or to avail any witness or evidence to explain the content of the said report.

11. In their submissions in the lower court filed on 17<sup>th</sup> July, 2015, the defendant argued that the treatment notes should be relied upon because Dr Onyimbi's report was exaggerated in light of *Dr Leah Wainaina's* report, DEXb 1, and that both doctors did not examine the patient immediately after the accident. However, I have seen no report from the said Dr Leah Wainaina.

12. In the appeal at paragraph 5, the trial magistrate is faulted for *"failing to consider the Appellant's evidence on the injuries suffered vis a vis the injuries alleged by the Respondents and evidence before the court and as such made an award that was against the weight of the evidence"*. Paragraph 5 of the Defence however, does not allege any injuries and instead denies the particulars of injury. Further, as earlier stated, the Defendants did not provide any evidence or avail any witness.

13. In addition, in the appeal the appellants indicate that there was no fracture of the fibula, or damage to the bladder or deep cut wounds to the scalp. However, I have

14. As I have already indicated, I have also seen the medical Discharge summary document from St Joseph's Hospital Nyabondo. One of the aspects I was able to note in it was the examination findings in which there is a comment on "urinalysis". That is normally connected to bladder issues, although there is no clear evidence of the connection with the accident.

15. As also earlier pointed out, the appellant did not file submissions, so there are no arguments in relation to the filed documents of appeal or the evidence availed to enable this court to evaluate the lower court's alleged errors. In an appeal as in all evidential matters, it is for he who asserts to prove.

16. In the circumstances, this court is left in the following position: the court has an appeal with little information; The appellant has filed an appeal impugning the lower court's judgment but has made no submissions in respect of the appeal. Further, in the lower court, the appellant/defendants did not file any evidence to counter the evidence of the plaintiff who testified and produced exhibits. They did however file submissions in the lower court. Thus, in this appeal, the court is being forced to speculate and imagine based mostly on pleadings and submissions.

17. As far back as 1972, the then East African Court of Appeal had held in **Mohammed & Another v Haidara [1972] E.A 166** that the contents of a plaint are only allegations and cannot be deemed to amount to evidence. Subsequently, in **Francis Otile v Uganda Motors Kampala HCCS No. 210 of 1989** it was held that the court cannot be guided by pleadings since pleadings are neither evidence and nor can they be a substitute therefor.

18. Similarly, in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence. **Madan, J** (as he then was) in **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, had the following to say concerning pleadings:

***"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of***

**“evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”**

19. As already noted, only the plaintiff testified in the lower court and availed documentary evidence. The proceedings of the lower court show that the counsel for the defence chose not to cross-examine the plaintiff. Thus the plaintiff closed his case. The defence availed no witness and also closed its case.

20. What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**, Lesiit, J citing the case of **Autar Singh Bahra and Another v Raju Govindji, HCCC No. 548 of 1998** appreciated that:

**“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.**

21. In the present case, the statements in the defence must be treated as merely a set of averments. The averments seek to negate the claim, but are absent of any substantiating evidence, nor cross-examination to test the evidence supplied by the claimant in support of his claim. Immediately prior to the testimony of the plaintiff, the parties entered into a consent on liability at the ratio of 90%:10% in favour of the plaintiff. In essence, the parties conducted a shortcut process.

22. In **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001** the court highlighted the effect of pleadings where a party fails to call evidence in support of its case: namely, that that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

23. Odunga J faced a somewhat similar situation in **East Africa Portland Cement, CFC Stanbic Limited & Another v Peter Ividah Muliro [2019]** where he stated:

**“8. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved. It is however unfair to the court to just throw all manner of documents at the court by way of annexures to the submissions and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by Ringera, J (as he then was) in Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

**“the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant’s state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise.”**

**9. The same Judge in Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 held that:**

**‘Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident.’ ”**

24. In the absence of defence evidence and cross examination of the plaintiff, how is the evidence of the claim to be evaluated, if not by relying on the plaintiff’s evidence? In **Lehmann’s (East Africa) Ltd v R Lehmann & Co. Ltd [1973] EA 167** it was held that:

**“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”**

25. This court is in the unsatisfactory situation that the only evidence on record is that supplied by the plaintiff, and it is untested through cross-examination. In the appeal, this court can do no more than rely on the evidence adduced. And, as usual, this court will not interfere with a decision of the lower court unless it is shown that the award is inordinately high or low or took into account or excluded matters that ought to have been taken into account or excluded.

26. Here the appellant has totally failed to show, on the basis of the evidence, how the award is flawed and why this court must interfere. In the circumstances, the appellants have not discharged their burden. The appeal therefore fails and is hereby dismissed with costs to the respondent.

#### **Administrative directions**

1. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams/Zoom tele-conference with the consent of the parties noted

hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

2. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

3. Orders accordingly.

**Dated and Delivered from Nairobi by video-conference this 21<sup>st</sup> Day of May, 2020**

**RICHARD MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Mr Kariuki for the Appellant
2. Mr Maube for the Respondent
3. Court Clerk Quinter Ogutu.