**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 26 OF 2019**

**DANIEL ODHIAMBO NGESA.....APPELLANT**

**VERSUS**

**DANIEL OTIENO OWINO.....1ST RESPONDENT**

**EZEKIEL OTIENO OWINO .....2ND RESPONDENT**

**(Being an appeal from the original civil suit in Bondo PMCC No. 143 of 2015 delivered by Hon. S.W. Mathenge on 12th June, 2019)**

**JUDGMENT VIA PHONECALL**

1. The Appellant herein **DANIEL ODHIAMBO NGESA** was the plaintiff in the subordinate court. He was allegedly involved in a road traffic accident along Bondo Usenge Road on the 10th Day of July 2015 at about 8pm. He was allegedly injured in the areas of his body as pleaded in his plaint dated 25th November, 2015, when two motor vehicles, KBK 593 S in which the appellant was a passenger collided with Motor vehicle registration number KAL 366 D belonging to the second Defendant/Respondent EZEKIEL OTIENO OWINO and being driven by the 1st Defendant/Respondent DANIEL OTIENO OWINO. The appellant blamed the respondents for the said accident, and pleaded particulars of negligence in paragraph 4 of the plaint.

2. Liability between the appellant and the Respondents was agreed by consent with the appellant bearing 20%whreas the Respondents agreed to bear 80% liability.

3. The trial court was then left to hear evidence on quantum of damages payable based on the injuries allegedly suffered by the appellant.

4. In her judgment delivered on 12th June, 2019 which is impugned before this court, the learned trial magistrate found that the appellant had not proved the injuries allegedly sustained hence she dismissed the plaintiff/appellant's prayer for general damages and only awarded him proven special damages which were pleaded.

5. Aggrieved by the decision of the trial magistrate, the appellant filed this appeal on 10th July, 2019 setting out the following grounds of appeal:

> **1. The learned trial magistrate erred in law and in fact in failing to award the appellant general damages yet the appellant suffered injuries and produced evidence in court to support the same;**
>
> **2. The learned trial magistrate erred in law and in fact in writing a judgment which is at variance with the pleadings and against the weight of evidence;**
>
> **3. The learned trial magistrate erred in law and in fact by failing to appreciate the appellant's injuries thereby failing to award the appellant damages.**

6. The appellant prayed that the judgment in Bondo PM CC No. 143 of 2015 on quantum be set aside and that this court do make its own findings on quantum based on the pleadings, evidence on record and the submissions of the parties. He also prayed for costs of the appeal.

7. In support of the appeal, the appellant filed written submissions which were adopted by his counsel as canvassing the appeal. The Respondents' counsel did not file any submissions despite the court granting them more time to do so.

8. This being a first appeal, this court is obliged to abide by the provisions of section 78 of the Civil Procedure Act and the principles espoused in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** as enunciated in the s**ielle v Associated Motor Boat Co. Limited** where the Court of Appeal stated as follows regarding the duty of first appellate court:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:**
>
> **"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

9. The evidence in the trial court shows that the accident took place on 10/7/2015 at about 8 p.m. There is no dispute that the accident actually took place and that the appellant was involved in the said accident as evidenced by the consent on liability between the appellant and Respondents' counsel on record.

10. However, as to whether the appellant was in injured following the said accident is a matter of proof and the burden of proof always lies with the person who alleges. See sections 107 to 112 of the Evidence Act.

11. Revisiting the evidence adduced before the trial court, the Plaintiff's/Appellant's testimony in court on oath was that **he** sustained injuries as a result of the road traffic accident of 10/7/2015, which is the basis of his claim in court. He stated that as a result of the accident, he suffered injuries which included dislocation of his right shoulder, injury on the neck, injury on the back and a dislocation on the right foot as well as bruises on the left leg. He stated that he was taken to Bondo District Hospital where he was treated as per Ex 2a, a prescription note dated 15/7/2015 and 2b-CXR Report dated 15/7/2015.

12. In cross examination, the appellant stated that he was not yet healed and that he was still undergoing treatment. He stated that he went to Jaramogi Oginga Odinga Hospital but he could not produce any treatment notes in court. He stated that he did not have the documents showing that he was treated or that he was given medication on the date of accident on 10/7/2015. He confirmed that the documents that he referred to as treatment notes from Bondo District Hospital did no have any outpatient number.

13. The plaintiff/ appellant's witness Professor Okombo testified and produced a medical report dated 20/1/2015 enumerating the injuries which were also pleaded in the plaint as follows:

- **Blunt chest injury**
- **Sprain on the neck at the left side**
- **Dislocation of the right shoulder joint**
- **Blunt abdominal injury**
- **Friction lacerations on the left lower limb**
- **Dislocation at the ankle joint**

14. The doctor stated that at the time of examination, the appellant complained of pain on the injured areas as enumerated above and that X-rays showed dislocations in the right shoulder joint and ankle joint. He stated that the appellant had not fully recovered and needed further treatment involving physiotherapy and analgesics. He classified the injuries as harm.

15. In cross examination the doctor confirmed that without the treatment document from the hospital, it would be very difficult to confirm injuries. He also stated that the patient did not give him outpatient number and that the said outpatient number was mandatory and that they have patients' files in each health facility which contains patients' details and treatment documents, which are the only ways to confirm that the patient was treated.

16. PW3 the Clinical Officer from Bondo District Hospital produced the prescription note on behalf of Dr Otwoma D.J who had since left the hospital. He also produced the CXR Report made by the Radiologist who had gone to Nairobi for training.

17. PW3 also produced photocopies of Exhibits 2a and 2b, as produced by the appellant, as Defence Exhibits 1a and 1b. The said photocopies are not stamped unlike the originals thereof. He confirmed that it is mandatory for each patient to have an outpatient number and confirmed that the exhibits he had produced had no patient's number. He stated that the prescription Ex 2a had no medication for dislocation. He stated that the medicine prescribed was for both pain and antibiotic. He stated that he had no treatment notes from the hospital.

18. The defence closed their case after letting PW3 produce photocopies of P/Exhibits 2a and 2b as DEx 1a and 1b respectively.

19. The trial court in its judgment which is impugned declined to award general damages on the basis that the appellant had not proved on a balance of probabilities that he was injured following the accident on 10/7/2015 and that he had not produced any treatment notes to establish the injuries. Further, that the complaints in the medical report by Prof Okombo which was made six months after the accident could not be attributed to the accident of 10/7/2015 more so in the absence of treatment notes to support. The trial magistrate further observed that the P3 form was not produced despite being marked for identification.

**SUBMISSIONS**

20. In support of this appeal, only the appellant's counsel filed written submissions to canvass the appeal, which basically challenges the trial court's findings on quantum of damages.

21. The appellant in his submissions argued that failure to produce treatment notes is not fatal to his case. He cited several decisions among them, **Beatrice Nthenya Sila v Ruth Mbithe Kitsisa &3 others [2014]e KLR** where it was held that the fact that a medical report was prepared three months after the accident and failure to produce treatment notes and a P3 form as exhibits was not fatal to the plaintiff's case, as the medical report was not challenged by production of contrary report and that each of the Respondents testified and stated the injuries they suffered hence they discharged the burden of proof in civil cases which was on a balance of probabilities.

22. Further reliance was placed on **Eric Juma & 2 Others v Fredrick Gacheru &Another Kisumu CA 120 of 2013[2016] e KLR** where it was held that failure to produce treatment notes cannot defeat a suit as it is not evidence of involvement in an accident. That the existence of treatment notes would assist in establishing consistency and corroborating the other evidence but are not necessarily decisive.

23. The appellant's counsel further relied on Charles **Maranga Baqwasi & another v Kamonjo Muchiri &Another [2000] e KLR** and a submission made that the Court of Appeal held ***that even though the medical report and treatment notes were not produce,d the appellant gave credible and unchallenged evidence hence he ought to have been awarded some general damages.***

24. Similar holdings were in **Joseph Munyambu Karega v Charles Ogollah Obiero [2014]e KLR; Stephen Kagooi v Joseph Waithaka Kabai & 3 others HCC 4089 of 1988** and **Mwanzani Mwakitu v Chandaria Ltd [2015]e KLR** where the courts held that failure to produce treatment notes or medical report was not fatal to the respective plaintiff's cases.

25. On actual quantum, counsel relied on **JALDESSA DIBA T/A DIKUS TRANSPORTERS & another v JOSEPH MBITHI ISIKA [2013]e KLR; Agility Logistics Limited & 2 others v Agility Logistics Kenya Limited [2015] eKLR and Thomas Ombima v Samson Anindo Mwenje [2018] eKLR** and urged the court to award the appellant Kshs 500,000 General damages as reasonable compensation together with specials of Kshs 1,350 as proved and awarded by the trial court.

**DETERMINATION**

26. I have considered the appellant's appeal, the submissions and the evidence adduced before the trial court. I have given serious consideration to the authorities relied on that challenge the decision of the trial court. In my humble view, the main issue for determination is whether the appellant proved on a balance of probabilities that he was injured following the accident of 10/7/2015 and if so, whether he is entitled to general damages and how much**.**

27. Principles guiding the appellate court are now well established. In **Nairobi Civil Appeal No. 77 of 1982 Ephantus Mwangi & Anor vs Duncan Wambugu [1984]eKLR it was held:**

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did."**

28. I am equally guided by the celebrated case of **Mbogo and Another V. Shah (1968) E. A. 93** where it was held that:

> **"a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result, there has been injustice.**

29. The appellant claims that he was injured following the accident of 10/7/2015 and that he was taken to Bondo District Hospital for treatment. He also stated that he reported the matter to Bondo police Station and was issued with a P3 form which was filled by Dr. Onyimbi. The P3 form was however not produced as an exhibit although it was marked for identification. The appellant produced a prescription sheet dated 15/7/2015 which according to PW3 did not have any medication for dislocation which was pleaded and testified on by the appellant and PW2 Prof. Okombo. No treatment notes were produced to show the initial injuries for which treatment was to be administered via the prescription note given on 15/7/2015 five days after the accident. The CXR report produced as EX2b shows all areas for investigation by way of Xray were normal including the chest, and the right shoulder joint. There is no mention of an ankle joint.

30. In my humble view, the injuries pleaded and allegedly sustained by the appellant were not proved. The appellant testified that he was treated at Bondo District Hospital for various injuries including dislocation of the shoulder joint. In support of the allegations, he produced as exhibits, prescriptions including CXR Report but there is nothing in the prescriptions and the CXR Report suggestive of any treatment in respect of the injuries allegedly sustained in the accident. In addition, the injuries for which the prescription note was given are not stated.

31. Furthermore, there is no explanation offered why the appellant who was involved in the accident on 10/7/2015 waited until 15/7/2015 which was five days after the accident, to go to hospital and instead of him being given treatment notes to support the prescription, he was only given prescription notes.

32. There is even no outpatient number indicated on the prescription note or on the CXR Report and therefore apart from the Red stamp on the said original documents showing Bondo District Hospital, there was no record of the appellant having been treated at Bondo District Hospital between 10/7/2015 and 15/7/2015.

33. Furthermore, DEX1a and 1b which are photocopies of Pex 2a and 2b have no similar stamp. This creates doubt in the mind of the court as to whether the appellant was ever injured following the accident and creates an irresistible impression that the Red Stamp from Bondo District Hospital on the original prescription and CXR report of 15/7/2015 was simply affixed or imposed for purposes of production before this court as there is no outpatient number and record in that Hospital of any investigations or before prescription for was treatment administered on the appellant. By way of a prescription note.

34. This court further observes that the Medical Report dated 20/1/206 prepared by Professor Okombo claims that following the pleaded accident, the appellant sustained injuries involving among others, dislocation of the right shoulder joint, dislocation of the ankle joint, tenderness of the chest. However, the CXR Report dated 15/7/2015 says that the lungs, ribs and pleura are normal. The alleged X-ray of right shoulder joint shows that the shoulder joint bones are normal and there was no mention of the ankle joint or even a dislocation thereof.

35. The question that I must pose is, where did the professor get the injuries from, yet he does not say that he did carry out his independent verification by undertaking Xray in the areas allegedly dislocated? Although in his medical report the Doctor claims that in preparing the Medical report for the appellant, he referred to treatment notes and Xrays, no such Xrays or treatment notes were produced by the appellant and neither did he explain the whereabouts of the treatment notes.

36. I reiterate that the prescription note produced by the appellant does not indicate what he was treated for if at all and therefore this court cannot be expected to presume that it was for his alleged involvement in a road traffic accident. The appellant also testified that he had not fully healed and that he was still undergoing treatment but he did not produce any evidence that he was receiving or had received any treatment for the lingering pain.

37. This court further observes that the P3 Form was as expected, issued by the Base Commander Bondo Police Station where the accident was reported. The appellant was referred to the MoH Bondo District Hospital for filling of the said P3 Form. Instead, the appellant was referred by his counsel to Dr. Onyimbi of Kisumu for filling of the P3 form. The question is, why did the appellant go all the way to Kisumu for filling of a P3 form instead of having it filled at Bondo District Hospital where he was allegedly treated following the accident?. That notwithstanding, the Appellant only had the P3 form marked for Identification. He never produced it as an exhibit hence it is useless. He also never applied to this court for adduction of additional evidence on appeal, assuming there was inadvertence in failing to produce the said document as an exhibit before the lower court.

38. This court is alive to the various decisions cited by the appellant's counsel including a Court of Appeal decision where it was held inter alia, that failure to produce treatment notes, P3 or Medical report is not in itself fatal to the plaintiff's case. I agree. However, in **Nairobi High Court Civil Case No. 4045 of 1988 Kabugu Mutua vs Kenya Bus Services** Justice Ringera pronounced himself thus and albeit a persuasive authority:

> **"Although I am of the opinion that lack of medical evidence is not fatal to a claim for damages for personal injuries, it is nonetheless manifest that only such evidence can clarify and substantiate the nature and extent as well as the sequels of alleged injuries."**

39. What emerges from the plethora of authorities cited by the appellant's counsel and the above decision which is also supported by the decision by Mbogholi Msagha J in **Caroline Waithira Kago v Stephen Muiruri Njau & another [2016] e KLR** is that there is divided opinion by the courts as to whether production of treatment notes or medical report is crucial to a plaintiff's claim. For avoidance of doubt, a P3 form dully filled is a medical report. In the above **Caroline Waithira Kago v Stephen Muiruri Njau & another [supra]** case, the learned Judge held and I concur, that:

> **" …….While the Learned Magistrate stated that the Defence did not produce any evidence to rebut that of the Appellant, it is nevertheless not incumbent upon the Court to fill gaps for the Appellant's case or make conclusions in her favour. Whereas the Appellant asserts that in civil cases, the standard of proof is on a balance of probabilities, it is upon a claimant in such a case to support his/her claim with consistent evidence which was not done in this case. In the event, I am unable to fault the learned trial magistrate in liability."**

40. In my humble view, this is not a case of merely failing to produce treatment notes or P3 form or the medical report. There was P3 form which for unexplained reasons the appellant did not produce it. Secondly, the so called treatment notes which turned out to be a stamped prescription and CXR report have no link to the injuries pleaded and allegedly sustained by the appellant. The appellant does not say why he could not get treatment notes for 10/7/2015 if at all he was taken to Hospital that same day of accident and why the prescription and CXR have no Hospital patient number. All these are factors that must be taken into account in determining the credibility of evidence adduced. In addition, the Medical report by Prof Okombo mentions injuries which are not consistent with the CXR report. prof Okombo does not say what treatment was administered on the appellant following the alleged injuries.

41. In my humble view, although the Respondents did not adduce any evidence to counter what the appellant adduced, it is nevertheless not incumbent upon the Court to fill gaps for the Appellant's case or make conclusions in his favour. Prof Okombo may be a medical expert but his evidence is wanting in credibility and probative value. The appellant's testimony and exhibits too are suspect.

42. On the weight a court of law should attach on expert opinion this court in the case of **Stephen Kinini Wang'ondu v The Ark *Limited [2016] eKLR*** held that:

> **"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided;**

**it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.**

**While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[11] Four consequences flow from this.**

**Firstly, expert evidence does not "trump all other evidence".7 It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.9**

**Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.**

**Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.**

**Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."**

43. In addition, the Court of Appeal, in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held:

**"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

44. I fully concur that expert evidence should not trump all other evidence, that it should not be considered in a vacuum and that the same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the court to evaluate complex matters, the said evidence is not compelling on its own. The evidence by Prof Okombo in my view was not consistent with the injuries allegedly suffered by the appellant. If he saw the treatment notes, where are they and if he also saw X-ray films on dislocations in the ankle and right shoulder joints, where are those X-rays or reports thereof and how those dislocated areas were managed?

45. I refuse to believe that the appellant was injured as pleaded and as testified by him and Prof Okombo. I agree with the findings by the trial magistrate and add that there was no credible evidence to support the testimony by the appellant and his witnesses and exhibits.

46. However, the trial magistrate should have quantified the general damages that she would have awarded the appellant ad he proved the injuries sustained as per his oral evidence and medical report and as pleaded in the plaint. Although this requirement has no foundation in law, it is only a good practice for a trial court to estimate damages payable.

47. Therefore, had I found that the appellant sustained the injuries as per the medical report produced by Professor Okombo and as pleaded and testified on the appellant, which injuries are nonetheless inconsistent and not proved, I would have awarded the appellant general damages in the sum of Ksh 150,000 based on the authorities of **Godwin Ireri v Franklin Gitonga (2018) e KLR** where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs.300,000/= was reduced to Kshs.90,000/= on appeal; and G**eorge Mugo & Anor v AKM (2018) eKLR** where the claimant sustained soft tissue injuries to the left shoulder, blunt chest injury interior, bruises of left wrist region and blunt injury left arm. An award of Kshs.300,000/= was reduced to Kshs.90,000/= on appeal.

48. On the whole I find and hold that the appellant's appeal is devoid of merit. The same is hereby dismissed. I however order that each party shall bear their own costs of the appeal.

**Dated, Signed and Delivered at Siaya this 6th Day of May, 2020** via phone to Mr. Geoffrey Okoth Counsel for the appellant as consented by Miss Nishi Pandit counsel for the Respondents**.**

**R.E. ABURILI**

**JUDGE**