REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 28 OF 2015

(Formerly No 173/2012)

JAMES MBURU NJOKI.....APPELLANT

VERSUS

RICHARD KIPKORIR LANGAT.....RESPONDENT

(Being an appeal from the judgment of Hon E Boke PM

delivered on 12th September, 2012 in CMCC No 453 of 2009)

JUDGMENT

Background and issues

1. This appeal was first filed in Nakuru in 2012, and was transdferred to Naivasha in 2015. It arises from injuries allegedly sustained in a road traffic accident that occurred on 12/4/2009 near Kongoni/Oserian road junction, Moi South Lake road. The plaintiff alleged he was a passenger in vehicle registration KAR 330N Matatu. The defence asserted that the plaintiff had filed a fraudulent claim and was not in fact involved in the accident.

2. By consent of the parties, the suit had been selected as a test suit to determine: the issues of liability; the involvement of plaintiffs in the accident and their injuries; and that if individual plaintiffs failed to prove involvement, then the issue of liability would not apply to them. The series of suits for which this suit No 453 was a test are: SRMCC Nos. 436, 438, 441, 443, 447, 449, 450, 451, 452, 455, 456, 463, 780 and 783 of 2009

3. Following a hearing at which the plaintiff availed six witnesses and the defence availed one witness, the lower court awarded damages as follows:

a. General damages	Kshs	400,000/-
b. Special Damages	Kshs	5,600/-
Total	**Kshs**	**405,600/-**

4. Dissatisfied with the judgment, the appellant appeals against liability and quantum of damages, stating that the whole case was not proved. The issues are summarized as follows:

In respect of liability –

- That the finding on injuries suffered was not proven since only treatment notes from Naivasha hospital and Dr Omuyoma's medical report were relied on but the notes for initial treatment from Oserian dispensary were not produced

In respect of quantum –

-That the trial court failed to take into account the appellant's submissions and awarded manifestly excessive damages

Analysis and determination

5. It is now trite that on a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind to give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. The appellate court must also be mindful of the principle stated by Law J.A. in the case of ***Butt v Khan (1977) KAR 1***, that:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

Liability: Whether there was injury and the place of the medical treatment notes

7. The asserts that the absence of treatment notes from Oserian Dispensary is a curious indicator that the injuries suffered, if any, were not properly documented. He also disputes the veracity of the plaintiff's hospitalization because the P3 form was apparently disputed by the Naivasha medical superintendent who testified as DW1.

8. The plaintiff, PW1 Richard Langat, testified that he boarded the accident vehicle at Oserian on 12/4/2009. The driver was driving at high speed, and on reaching some bumps the brakes failed and he lost control of the vehicle which overturned. He said he was a driver and knew when the brakes failed. He was taken to Oserian Health Centre then transferred to Naivasha District Hospital on 12/4/2009. He said he sustained a fracture on his right leg and bruises on his left knee. He was later treated at Kijabe Hospital where his plaster was removed. He produced, inter alia, Exhibit 4 Naivasha Hospital card No 25508 of 2009, and noted various exhibits, viz, MFI 5-9 which were marked for identification.

9. In cross examination he said he was given first aid at Oserian Dispensary then taken to Naivasha hospital for treatment. He did not produce treatment notes from Oserian Dispensary.

10. PW2 Joseph Kiragu, was the records officer at Naivasha District Hospital. He identified PExb 10 as a medical outpatient card from that hospital for treatment on 12/4/2009. He also identified a computer printout that he made which corresponds with the card. He, however, did not have any document to show that he works at the hospital.

11. I have perused the Outpatient Card No 25508/09 for Richard Langat at page 8 of the record of appeal. It clearly indicates the date of 12 th April, 2009. This is in tandem with the evidence of PW2 who clearly stated that the he was first given treatment at Oserian clininc and then sent to Naivasha District Hospital. What I am unable to clearly make out is the nature of the injuries indicated in the card as the handwriting is not legible to me.

12. PW3 Dr Fred Omuyoma was the doctor who examined the plaintiff on 5/5/2009. His report indicates the treatment card from Naivasha Hospital was dated 5/5/2009. In evidence, he testified that the plaintiff sustained the following injuries in a traffic accident on 12/04/2009:

> ***"fracture of the right tibia,***
>
> ***multiple bruises on both knees and***
>
> ***soft tissue injuries on left leg."***

In his evidence in chief, Dr Omuyoma, corrected his report where it read the date of 5/09/2009 to read 12/09/2009 as the date of the accident and the card.

13. In cross examination he said that he got the background history of injuries from the notes he saw from Naivasha Hospital card. He noted that at the time he saw the plaintiff he was in a plaster cast. He noted that his report had a mistake in the date and that the initial treatment notes were not before the court. He said the P3 form is filled after the patient has recovered. He reconfirmed his own examination of the plaintiff:

> ***"In the medical report I have my own findings. This is what I found on the patients"***

14. In my view, the doctor's evidence answers the concerns of the defence that the plaintiff had no injuries or was not involved in the accident. It is clear there were injuries. His medical report indicatesthe documents he relied on to include the Naivasha hospital card he wrongly indicated was dated 5/05/2009, the P3 form and the X-ray films of 12/04/2009 from Naivasha District hospital. The doctor stated that the treatment at Oserian Dispensary was for first aid, and noted that the main treatment of plaintiff was at Naivasha District hospital.

15. A P3 form for the plaintiff, dated 22/4/2009, was marked for production as an exhibit (ROA Pg 9). It indicates that the plaintiff was involved in the accident on 12/04/2009. The form is shown to have been filled in at Naivasha District Hospital.

16. PW4, PC Patrick Mbila confirmed in his testimony that the vehicle was involved in a self-involving accident on 12/04/2009; the accident was at Kongoni Oserian junction, Moi South Lake road; he produced the police file, although he admitted he was not the investigating officer; he indicated the names of the passengers which included the plaintiff; he confirmed that a P3 form is filled after treatment is done; and that the police officer filling the P3 has to check the treatment notes.

17. However, the medical superintendent at Naivasha Hospital, who testified as DW1, disputed the stamp on the P3 form, and further, he doubted the form as it had no signatory. To him it meant that *"the document was not produced through the legal channels in the hospital"*.

18. Although the evidence of DW1 may suggest that the process in the hospital was inefficient or was not followed in the manner DW1 would have expected, it does not, in my view, displace or contradict the evidence of the fact of the accident or of the injuries sustained by the plaintiff.

19. The driver of the vehicle (KAR 330N Matatu) was charged on 28/4/2009 and pleaded guilty to the charge. The lower court case concerning the accident SPMCRC No 725 of 2009 was availed and placed before the court. Whilst I note that the names of the injured passengers were not indicated in the charge sheet, it clearly states that *"several passengers sustained serious injuries*" in an accident on 12/04/2009 along Moi South lake road at Oserian junction. That, coupled with the fact that the plaintiff produced a police abstract (Pg 11 ROA) indicating that he was a passenger in KAR 330N during an accident on 12/4/2009 along Moi South Lake road near Kongoni Oserian junction prima facie and on balance confirms the plaintiff was a passenger in the said vehicle, and it would be up to the defendant to dislodge that evidence.

20. The appellant pleaded in the defence that the plaintiff was not a passenger in the said vehicle, that the accident did not occur, and that he did not sustain the injuries alleged. He however did not avail evidence in support of his assertions. The witness availed, DW1, testified only to the faults in the P3 form, as detailed above. His evidence was insufficient to persuade the trial court.

21. The appellant's submission on the absence of the initial treatment notes was founded on the dicta of Maraga,J (as he then was) in **Timsales Ltd v Wilson Libuywa [2008] eKLR** as follows:

> ***" 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 examines 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."***

22. This is the same position reached in **Eastern Produce K. Ltd -vs- James Kipketer Ngetali (2005) KLR where** the court stated that lack of evidence of treatment notes should have raised doubts in the trial magistrate's mind who should have found that there was no sufficient evidence to prove that the respondent was injured, and that the omission to produce the medical chit proved fatal to his case, and he could not prove the case on a balance of probability as required.

23. Reliance was also placed by the appellant on **Fadna Issa Omar v Malne Sirengo Chipo & 3 others [2016] eKLR** where Githua J stated:

> ***"18. In a situation like this where the doctor or health professional who treated an accident victim or filled the P3 form long after the accident had occurred is not availed as a witness, production of the treatment notes recorded by the doctor who first saw the victim, in this case the appellant when she first sought treatment was critical to prove not only the nature of the injuries sustained if any but also the date they were sustained.***
>
> ***19. It is worth noting that the appellant did not offer any explanation for failure to tender in evidence the treatment notes. In the absence of such primary evidence and considering that the p3 form was filled over a month after the accident, it was impossible for the trial court to make a finding of fact that the injuries noted in the P3 form were indeed sustained in the accident as pleaded and not on any other subsequent date."***

24. Similarly, in **Peter Migiro v Valley Bakery Limited [2015] eKLR Mulwa J** after analyzing the evidence, was:

> ***"…not convinced that the respondent was injured on the 27th 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 companie'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. I 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."***

25. It is clear that treatment notes are essential to contextualize and correctly place the date, time, nature and extent of the alleged injuries. The main evidential object is to ensure that there are no intervening circumstances that may give rise to doubts concerning the occurrence of the alleged injury or as to their nature and extent, and mode of treatment. Nevertheless, the determination as to whether the absence of treatment notes is fatal depends on the circumstances of each case, and whether there is other corroborative evidence of the accident and injuries.

26. In **Amalgamated Sawmills Limited v Joseph Njoroge Matheri [2010] eKLR** Emukule J pointed out that there may be circumstances when a treatment card need not be produced, and its absence would not be fatal:

> ***"Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a Doctor's Report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim."***

27. In the present case however, and as rightly noted by the trial court, the treatment given at Oserian Dispensary was merely first aid; and it was administered immediately after the accident on 12th April, 2009. It is the first aid treatment notes that were not produced. However, it is also in evidence that the plaintiff was immediately thereafter taken to Naivasha District hospital where the pop (plaster of paris) was administered to treat the fractures and oral analgesics were also administered. The treatment card for Naivasha Hospital was produced and clearly confirms that the treatment was done on the same day, 12th April 2009.

28. Dr Omuyoma's medical report relied on the treatment notes made at Naivasha Hospital on the same date of the accident, and those notes relate to actual substantive treatment administered to the plaintiff for the injuries sustained on that date.

29. In light of the foregoing and on the evidence availed in this case, I find that on a balance of probability, the plaintiff was involved in the said accident on 12th April, 200;, that he sustained the injuries indicated on that date; that the treatment notes for Naivasha District hospital clearly relate to the injuries sustained on the day of the accident; and that the driver was charged and convicted for the accident on his own plea. I am unable to agree with the appellant that the absence of the treatment notes form Oserian dispensary have the effect of making it improbable for the trial court to make a finding that on balance, the plaintiff suffered the injuries alleged, given that the plaintiff filed treatment notes for Naivasha District Hospital where he was substantially treated the same day.

30. Accordingly, I uphold the trial court's finding on injuries suffered by the plaintiff and on liability.

Quantum of damages awarded

31.In respect of quantum, the main argument of the appellant is that the trial court failed to take into account the appellant's submissions and awarded manifestly excessive damages.

32. The appellant's submissions on this issue in the trial court were to the effect that, he had demonstrated that there was no liability on his part, and that the discussion on quantum was purely academic. He submitted that an award of 100,000/- would be sufficient and cited **Mulwa Musyoka v Wadia Construction Nairobi HCCA No 1321 of 2007**. No other authorities were tendered on damages by the appellant on appeal.

33. On his part, the plaintiff in the trial court relied on the case of **Philip Kirorei v Hassan Noor Abile HCCC No 725 of 1995 Nkr** and sought an award of Kshs 500,000/-.

34. I note that at page 58 record of appeal, the trial magistrate considered the authorities availed by the parties as well as their submissions, and stated:

> ***"Both counsel failed to attach the Authority for the court to compare the similarities and dissimilarities in terms of injuries with the current case***

35. The trial magistrate evidently obtained the case of Philip Kirorei herself because she then evaluated and assessed it (page 59 record of appeal) and found that the injuries were more serious than those in case before her, but took into account that the authority was quite old. She then awarded Kshs 400,000/-.

36. In **Mulwa Musyoka's** case, Ang'awa, J, found the plaintiff to have sustained i) Bruises on face and head ii) Fracture mid shaft femur iii) Unconsciousness for 30 minutes iv) Fracture of mid shaft left tibia and was awarded general damages of Ksh.150,000, in a judgment rendered in 2004, twelve years before the trial court's determination.

37. On careful consideration, I find no persuasive reason to impugn the trial court's reliance on the Philip Kirorei case, and on the trial magistrate's reasoning in her judgment. There is nothing to show that the trial court misapprehended the facts or misapplied the law, or that the quantum awarded was inordinately high.

Disposition

38. In light of all the foregoing, I decline to interfere with the trial court's entire determination and hereby dismiss the appeal with costs to the respondent.

Administrative directions

39. 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 Zoom/Teams video/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 Deputy Registrar/Executive Officer, Naivasha.

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

41. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 11th Day of June, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Kariuki for the Applicant

2. Ms Gulenywa for the Respondent

3. Court Clerk - Quinter Ogutu