



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CORAM: D.S. MAJANJA J.**  
**CIVIL APPEAL NO. 81 OF 2014**

**BETWEEN**

**SALIM MECHA NYANDORO .....APPELLANT**

**AND**

**NYANGENA HOSPITAL LIMITED .....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. K. Sambu, PM dated 19<sup>th</sup> June 2014 at the Magistrates Court at Kisii in Civil Case No. 514 of 2012)*

**JUDGMENT**

1. The appellant, Salim Mecha Nyandoro, filed a suit against the respondent, Nyangena Hospital Limited (“the Hospital”), seeking to recover special and general damages for negligence following injuries he sustained after falling from a balcony at the Hospital premises on 20<sup>th</sup> November 2010. The Hospital denied the claim and alleged that if the incident took place, then the appellant was fully liable. The trial magistrate heard the matter and dismissed the claim thus precipitating this appeal.
2. The appellant’s case before this court is set out in the memorandum of appeal dated 16<sup>th</sup> July 2014. The appellant faults the trial magistrate’s finding that he did not prove his case on a balance of probability despite presenting sufficient evidence to support his case. He contended that the trial magistrate erred in failing to hold the Hospital liable for the actions of its employees and exonerating it for occupiers’ liability.
3. In addition to the grounds set out in the memorandum of appeal, counsel for the appellant filed written submissions. He submitted that the Hospital owed a duty of care to the appellant under **section 3(1) and (2) of the *Occupiers Liability Act (Chapter 34) Laws of Kenya*** and in so far as it failed to take adequate measures to prevent injuries to its patients and persons on its premises particularly the appellant.
4. The Hospital’s case is that the appellant failed to prove its case on the balance of probabilities. Its counsel submitted that the appellant failed to plead its claim under the ***Occupier’s Liability Act*** and it was not an issue for determination before the trial court and could not be relied to support his case. The respondent argued that the appellant failed to produce evidence that the accident took place on 20<sup>th</sup> November 2010 as pleaded in the plaint given that the accident in fact occurred on 22<sup>nd</sup> November 2010.
5. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and***

**Another v Associated Motor Boat Company Ltd [1968] EA 123**). The same view expressed by Sir Kenneth O'Connor in **Peters v Sunday Post Limited [1958] EA 424** follows:

*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.*

6. At this stage, I wish to point out that the following facts are not in dispute; that the appellant was a patient at the hospital, that the accident took place and he was injured. Regarding the date of the accident, the appellant's case was that he fell on 20<sup>th</sup> November 2010 while the Hospital insisted that he fell on 23<sup>rd</sup> November 2010. The hospital records show that he was injured on 23<sup>rd</sup> November 2010 but I do not think the error on the date is material for both parties through their witnesses admit that he fell and was injured.

7. The appellant testified that on the material day after taking breakfast and drugs, one of the defendant's employees, directed him to go and bask in the sun. He stated that he was shown a tank where he proceeded to sit along a corridor with other patients. After some time, he tried to return to his room but because he felt weak, he fell down and injured his head and hip joint. He denied that he jumped from the balcony.

8. When the court visited the *locus in quo*, the appellant gave further evidence. He testified that showed the court the gate leading to the corridor over the ramp which he stated was opened by patients. He told the court that he entered and sat with fellow patient's basking. After other patients left, he also stood to leave he felt dizzy and fell down over the balcony to the concrete ground.

9. Edinah Cheronno Tesot (DW 1), one of the hospital matrons, recalled that on 23<sup>rd</sup> November, 2010 she was informed that the appellant had fallen. She rushed to the scene and found the appellant lying on the floor bleeding all over. She told the court that she suspected that the appellant had fallen from the balcony where patients normally rest but not the water tank balcony as alleged by the appellant. Dr. Ezekiel Archimedes Orwenyo (DW 2), a director of the Hospital, testified that he was informed of the appellant's fall. He was informed that the patient had fallen from the balcony with half a grill. He told the court that it was suspected by the hospital staff that the patient had fallen from the corridor where the patients usually rest, which a five (5) feet grill was installed. He testified that the height from the ground to the half grill is 5 feet 10 inches and that the grill leading to the water tank was always closed and no one is allowed to get in.

10. The main issue in this case is whether the appellant proved its case on the balance of probabilities. Counsel for the respondent submitted that the appellant could not rely on the **Occupiers Liability Act** as he did not plead it in the plaint. This issue is adequately answered by **section 3** thereof which defines the scope of the duty of care an occupier owes to visitors in any premises as follows:

*3 (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.*

*3 (2) For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

11. The provision is a codification of the common law duty of the occupier and defines the applicable duty of care. Since the occupier owes a duty of care generally, it does not matter whether the specific act is pleaded or not. I agree with the view expressed by Aburili J., in **MNK (suing thru father and next friend) Patrick Kyalo Maundu v Joseph Mwaura NRB HCCA No. 59 of 2011 [2017]eKLR** that:

127. *The Occupiers Liability Act Cap 34 Laws of Kenya covers all the lawful occupants, visitors, and trespassers. The plaintiff is not expected to plead the law but facts and submit on the law which her counsel did, in this case, to the satisfaction of the court.*

12. The Court of Appeal in ***Soma Properties Limited v HAYM NRB CA Civil Appeal No. 74 of 2005 [2015] eKLR*** (per Ouko JA) elucidated the meaning and scope of duty of care owed by the occupier of premises under the **Act** as follows:

*This provision, imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words “reasonable” and “reasonably” used in the above extract emphasize the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. Thus an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.*

13. The trial magistrate appreciated the contours of the Hospital’s duty towards the appellant. He was of the view that, *“The Defendant Hospital, in my view, ordinarily owes their patients and all those working in their premises a duty of care as expected of them under the occupiers’ liability principle.”*

14. In this case, the basis of the appellant’s claim is set out in the particulars of negligence set out in paragraph 5 of the plaint are as follows:

**PARTICULARS OF NEGLIGENCE ON THE PART OF THE DEFENDANT**

- i) *Failure to fence or protect the flat roof of the premises.*
- ii) *Exposing the Plaintiff to a risk of injury which they knew or ought to have known.*
- iii) *Failure to restrict the plaintiff who was their patient from wondering in the flat roof.*
- iv) *Failure to provide any or adequate precautions for the safety of the Plaintiff while he was a patient in that hospital.*
- v) *Failure to take any measures to prevent the said accident from occurring.*
- vi) *Res ipsa Loquitur.*
- vii) *Failure to take reasonable care to prevent the plaintiff from falling.*

15. The issue of the Hospital’s liability turned on whether the appellant fell from the water tank balcony and whether the Hospital had secured the balcony from where the appellant claimed that he had fallen. The trial magistrate visited the premises and recorded his observations in the judgment as follows:

*The court when it visited the scene, following the Defendant’s application, [it] found for a fact that the Defendants corridors balcony are barricaded with some erected grills five feet, ten inches high to avoid one from slipping down and it would therefore take one to climb the erected grills for him to slip and fall from the corridor or the water tank balcony. The court found for a fact that the water tank balcony is a locked grill meant to avoid any one from entering therein and to protect [the] same from contamination of the Hospital’s harvested water therein.*

16. Apart from the conclusions drawn by the trial magistrate, the pictures produced by the respondents show a corridor leading to the balcony with the tank with a locked grill door. The testimony of DW 1 and DW 2 is that the water tank was on a balcony although they contended that the access gate was locked. The respondent’s witnesses did not produce any pictures of the balcony with the water tanks. The pictures

produced show the corridor with the half grill which confirms that the for the appellant to fall from that corridor he would have to climb the grill. DW 1 and DW 1 did not discount the fact that the appellant fell from the balcony or that it was improbable for him to have access to the balcony with the water tanks.

17. While I accept the trial magistrate had the advantage of visiting the scene, he did not comment on or address the issue whether the balcony had a fence or grill to prevent a person, particularly a person in the position of a patient, from falling. Neither the court nor the respondent's witnesses pointed out where the appellant fell in relation to the corridor or the balcony with water tanks. It is true that there was a metallic door barring access to the water tanks that was locked on the day the trial magistrate visited the scene but that alone does not mean it could not have been left open from time to time. Indeed, DW 1 admitted that there was a possibility that the gate would be opened by a plumber working there.

18. I am therefore constrained to accept the appellant's evidence that he had access to the water tanks. He clearly stated that he, and other patients, were permitted to go there by one of the Hospital employees and since the balcony where the water tanks were situated had no fence and was accessible to patients, I find and hold the Hospital fully liable.

19. I now turn to the issue of damages. The trial magistrate held that had the appellant's case succeeded, he would have awarded Kshs. 500,000/- as general damages. The appellant faulted the award in light of the severe injuries he suffered and urged that it was too low. The nature and extent of the appellant's injuries was not disputed. He sustained a head injury resulting in confusion after the accident, blunt trauma to the scalp and chest which were tender, swollen and tender left elbow, fracture of the olecranon of the left ulna and a sub trochanteric fracture of the left femur and a swollen and tender left hip and thigh.

20. Counsel for the appellant submitted that the injuries pleaded were not disputed and that an award of Kshs. 1,500,000/- as general damages was appropriate. He relied on **Bessie Mnazi Njuta vs Sanji Harji Nathod & Another MSA HCCC No. 898 of 1991 (UR)** where the court awarded Kshs. 527,000/- in 1994 where the plaintiff suffered compound comminuted fractures of the radius and ulna of the right forearm, fracture of the radius and ulna of the left arm close to the wrist joint, large badly soiled wound at the right forearm with exposed torn muscles and skin loss.

21. The respondent relied on **Bernard Ndirangu vs Waruru Kanja & Others NBI HCCC No. 3450 of 1982 (UR)** where the plaintiff was awarded Kshs 300,000/- and the case of **Agnes Okoth and 30 others v Nyabichuku & Another NBI HCCC No. 1540 of 1988 (UR)** where the plaintiff was awarded Kshs. 220,000/-. Counsel submitted that an award of Kshs. 350,000/- would be adequate.

22. The guiding principle for consideration of this appeal is that for the appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

23. The award of general damages is not a precise or scientific exercise and since general damages are damages at large, the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**). It is thus the duty of advocates to cite to the court appropriate cases to guide the court on the award to make. In this case, both counsel for the appellant and the respondent cited dated cases which the trial magistrate considered before coming to the conclusion that an award of Kshs. 500,000/- was reasonable. In the circumstances, I cannot say that the appellant has established that the trial magistrate erred in light of the principles of **Butt v Khan (Supra)**.

24. I therefore allow the appeal, set aside the judgment dismissing the appellant's claim and substitute it with judgment for the appellant against the respondent for Kshs. 500,000/- together with interest at court

rates from the date of judgment before the trial court until payment in full and costs therefore. The respondent shall pay costs of the appeal which I assess at **Kshs. 40,000/-** all inclusive.

**DATED and DELIVERED at KISII this 13<sup>th</sup> day of FEBRUARY 2019.**

**D.S. MAJANJA**

**JUDGE**

Ms Ondeyo instructed by Onyinkwa and Company Advocates for the appellant.

Mr Soire instructed by J. O. Soire and Company Advocates for the respondent.