



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 149 OF 2016**

*(Appeal originating from the Judgment of Hon. J.B KALO Chief Magistrate at Nakuru in civil case Number 108 of 2016)*

**BETH NJERI KOIGI.....APPELLANT**

**=VERSUS=**

**MARTIN MURAYA RWAMBA..... 1<sup>ST</sup> RESPONDENT**

**GAKUYO JOSEPH.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This appeal arises from civil suit no.108 OF 2016 filed by the Appellant against Respondents seeking general and special damages for injuries sustained on 23<sup>rd</sup> April 2016. Consent on Liability was recorded at 80%:20% in favour of the appellant. The trial court in judgment delivered on 15<sup>th</sup> November 2016 dismissed the plaintiff's suit with costs.

2. The appellant was dissatisfied with decision of the trial court filed this appeal on 19 grounds summarized as hereunder:-

i. That the learned magistrate erred in fact and law by not properly analyzing and considering material /evidence on record while arriving at his decision/judgment on assessment of damages payable

ii. That the trial magistrate erred in failing to find that the evidence and material medical reports tendered on behalf of both the appellant and the respondents herein established/proved to the required standard injuries sustained by the appellant

iii. That the trial magistrate failed to consider submissions filed while arriving at the decision on damages

iv. That the trial magistrate erred in fact and law by visiting failure by hospital in not filling treatment card on the appellant and drawing negative inference on the appellants treatment notes

v. That the trial magistrate in fact and law by attaching more weight, reliability and probative value on documentary evidence than oral evidence

vi. That the trial magistrate erred in fact and law by failing to award the appellant general and special damages despite the appellant having proved her case to the required standard.

vii. That the trial magistrate erred in fact and law by failing by failing to analyze the ripple effect of respondents conceding liability on assessment of damages payable

viii. That the trial magistrate erred in fact and law by writing a judgment that is not only incomplete but also not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable law and principles for award of damages.

ix. The appellant sought reversal, review and/or setting aside of the judgment and award general and special damages plus costs of both lower court case and this appeal.

## **APPELLANTS SUBMISSIONS**

3. Appellant submitted that parties agreed liability in the lower court. What remained for court's determination was assessment of damages. Appellant further submitted that it was not disputed that an accident occurred and the appellant was injured; that the appellant went to Nakuru PGH for treatment as exhibited by documents issued by the hospital and parked PEXB 1 as shown on page 44 to 50 of the record of appeal.
4. Appellant submitted that it is not a rule of law to dismiss a case in a situation where the treatment notes produced are blank or are not produced at all; that each case should be treated on its own peculiar circumstances and merit and that the standard of prove is on a balance of probabilities. Appellant added that the trial magistrate should have sought explanation as to why the initial treatment card did not capture injuries before reaching a decision to dismiss appellant's case. Appellant added that there were adequate materials on record to enable him ascertain what injuries the appellant suffered.
5. Further, the appellant submitted that treatment notes are neither mandatory nor only way to prove injuries. Appellant cited the case of **Henry Binya Oyala V Sabera O.Itira [2011] eKLR** where the court held that the primary source of information on injuries sustained is by the victim and evidence of medical officer is not mandatory. That a victim's own statement with regard to injuries should not be dismissed merely on ground that it was not matched by initial treatment from hospital.

## **RESPONDENTS SUBMISSIONS**

6. Counsel for the respondent submitted that the only challenge on the trial magistrate's judgment is that the plaintiff failed to prove her case to the require standard by failing to prove injuries suffered.
7. Respondent submitted that initial treatment card produced by the appellant is blank and did not indicate any injury. Further, the P3 form was filled 7 months after the accident and that the doctor Kiamba who prepared medical report saw the appellant the same day the P3 was filled. That he used P3 and radiological request form to prepare medical report.
8. Respondent's contention is that the appellant failed to prove injury sustained and was not therefore entitled to any damages; that given the span of time between the times plaintiff was involved in the accident herein she could have suffered other injuries.
9. That treatment notes are primary evidence and there were no injuries indicated in the treatment notes.
10. Respondent urged the court to dismiss the appeal herein and uphold judgment delivered by Hon.J.B.Kalo on 15<sup>th</sup> November 2016.

## **ANALYSIS AND DETERMINATION**

11. This being the first appeal, this court is obligated to reevaluate evidence adduced in the lower court and arrive at an independent determination. I am however minded on the fact that the lower court had opportunity to take evidence firsthand and make observations on demeanor of witnesses.
12. From record and submissions of parties herein, what is in dispute is whether the appellant proved that she sustained injuries from the accident herein to the required standard. The issue of liability was settled by consent recorded in court by the parties herein. As indicated at the onset, liability was settled at 20:80 in favour of plaintiff.
13. On perusal of lower court proceeding, appellant testified that she sustained injury on the left hand on the elbow. Thumb, neck and for head. She said she was treated at Nakuru PGH and showed court a bundle of treatment cards and receipts
14. She further testified that she has not fully healed, as she cannot stand for long; that she feels dizzy and cannot use her finger.
15. Record show that the accident occurred on 23<sup>rd</sup> April 2015 and p3 was filled on 10<sup>th</sup> November 2015 by a doctor at Nakuru PGH where the appellant alleged she was treated on the day of the accident. Appellant said in cross-examination that she was not give P3 immediately. She explained that she went for police abstract one month on ground that the police officer who was to issue her was away. On delay in having P3, she explained that she was asked to heal first. She testified that she was still unwell and was on medication.
16. I however note PW3 health records information officer from Nakuru PGH confirmed that the hospital record indicate that the appellant was treated on 23<sup>rd</sup> April 2015. He confirmed that the treatment card indicating O.P NO.049565/15 was issued by the hospital. He however added that the patient did not proceed to see the clinician; that no injury is indicated in the card. In cross examination he said the treatment is computer generated and that the doctor who saw the patient was supposed to key in the injuries. He confirmed that X-ray request form was issued and that it is issued by the clinician who see the patient. He added that failure to make entries on the card may be an error on the person who saw the patient.
17. Form evidence of PW2, the appellant was seen at the hospital. The fact that she was issued with X-ray request form confirm that she was seen.
18. From Appellant's own testimony in court, she informed the court that she was still in pain. The medical officer who prepared her P3 also confirmed pain at the time of examination. Failure to make entries on treatment card cannot be attributed to the appellant.
19. My understanding is that the radiology request issued, form part of the initial treatment record. The doctor who requested X-ray must

have seen the appellant before making the request. He signed the radiology request form on 23<sup>rd</sup> April 2015 and indicated injury as left elbow joint. The form and the register form part independent evidence, which corroborate the appellant's evidence to the effect that she was seen as a patient at Nakuru PGH on 23<sup>rd</sup> April 2015. The waiver card produced show consultation as one of the type of service.

20. P3 though was also issued on 23<sup>rd</sup> April 2015, police filled the first part on the same day and it indicate that the appellant alleged to have sustained deep cut on left hand. The second part of P3 was filled by a doctor. On 10<sup>th</sup> November 2015; his findings are healed lacerations on the left hand.

21. Injuries stated by appellant in court by the appellant are consistent. In the radiology request form, first part of P3 form and injuries indicated by Doctor Kiamba who examined her and prepared medical report.

22. The standard of proof expected of the appellant is on a balance of probabilities. From evaluation of evidence on record, I find that the appellant discharged her duty of proving injuries she sustained herein on a balance of probabilities.

23. My finding is that the trial magistrate erred in dismissing the plaintiff's claim for damages for injuries sustained in the accident herein. I therefore set aside dismissal order and assess damages as hereunder:-

24. No authorities have been cited in this appeal in respect to quantum. I have however perused authorities cited in the lower court. I also note that the plaintiff urged the court to award Kshs 250,000 while the defendant urged Kshs 80,000.

25. Upon looking at the authorities and comparing the injuries suffered with injuries in the instant case, I find that an award of Kshs 150,000 as general damages will be sufficient to compensate the plaintiff. Special damages of Kshs 8,000 was proved by production of receipt. Total comes up to 158,000 less 20% contribution (31,600) net is Kshs 126,400.

### **FINAL ORDERS**

1. I hereby set aside dismissal order by Hon. J.B. Kalo.

2. Judgment is entered for the Plaintiff/Appellant against the Defendant/Respondent for Kshs 126,400(one hundred and twenty six thousand four hundred shillings only).

3. Costs in both the lower court to the appellant and this court from the time of this judgment until payment in full.

**Judgment Dated, signed and delivered at Nakuru this 7<sup>th</sup> day of March 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the Presence of:-**

Schola Court Assistant

Muchemi for J. Ndung'u & Njuguna Counsel for Appellant

M/s Ayuma for Kairu & McCourt Counsel for Respondent