REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 769 OF 2016

(CORAM: F. GIKONYO J.)

SAMUEL KARANI MURIITHI.....APPELLANT

VERSUS

EUTYCHUS WANJOHI & ANO.....1st RESPONDENT

BERNARD WANGOMBE THUO.....2nd RESPONDENT

(Being an appeal from the judgement of Hon P.O.Muholi (SRM) in Milimani Cmcc No. 985 of 2008 delivered on 30th November 2016)

JUDGMENT

Absence of treatment chits

1. The Appellant herein was the plaintiff in the trial Court whereas the respondents were the defendants.

2. The appellant alleged in the plaint that the 1ST Respondent was the registered owner of motor vehicle Registration No. KAV 232F driven by the 2ND Respondent. That on 7th May 2006 the 2nd Respondent drove, managed the motor vehicle so recklessly and negligently that it hit the appellant who was lawfully standing at Muigai Kenyatta Avenue Road- Dandora.

3. The 1st and 2nd Respondent filed a joint statement of Defence on 20th June 2008 denying the averments in the plaint in *toto*. They also attributed negligence to the appellant specifically for being intoxicated and careless on a busy road. The appellant filed a reply to the statement of defence denying the allegations of negligence.

4. During the hearing three (3) witnesses testified on behalf of the Plaintiff. Pw1 the plaintiff testified that he was at Muigai Kenyatta Road at the stage where he was hit and injured on the stomach and right leg. That he went to Kenyatta National Hospital and later reported the matter to the police. He produced receipts from Kenyatta National Hospital totalling Kshs. 31,085, P3 Form, copy of records from K.R.A, Medical report from Dr. Kiama and Demand letter as Exh 1-10.

5. **Pw2 John Murata Kangata** was the appellant's father. He testified that the appellant was involved in a Road traffic Accident but he was not present at the scene of the accident. He stated that he is the one who paid for the Hospital bills totalling Kshs. 16,585/=.

6. **Pw3 Dr. Kiama Wangai** a Medical Practitioner testified that he examined the appellant on 6/8/2007. It was his testimony that the appellant suffered 2 fractures, pelvis-public bone suffered fracture of the illac bone- friction burns of the abdomen and right thigh.

7. It was his opinion that the appellant suffered grievous harm. He recovered from the injuries with painful scars of cosmetic significance. He apportioned disability at 10%. Medical Report was produced as Exh 11.

8. The trial court found that the accident occurred and held the Defendant 100% Liable. The trial Court however took issue with the fact that no treatment notes from Kenyatta National Hospital was produced and Dr. Kiama did not tell the court where he obtained the information of the injuries given that the plaintiff was examined on 6/8/2007 which is 1 ½ years after the accident. It held that it was imperative that the plaintiff brings the initial treatment notes of the hospital.

9. It also found that the P3 form being faint and Part II lacked information on the injuries sustained. On that basis, it dismissed the suit for general damages. It noted that the medical expenses need to be supplemented by treatment chits and in the absence thereof, no expenses should be awarded. The court only awarded Kshs. 1,500/= for the medical report Kshs 500/= for the Copy of records and Kshs 5,000/= for

doctors attendance.

10. Aggrieved by the determination of the trial Court the Appellant filed its memorandum of Appeal dated 15th December 2016 raising six grounds of appeal that expressly contested the determination of the trial Court in refusing to award general damages as prayed and as per the evidence adduced.

Submissions

11. On 6th August 2018 this Honourable Court directed parties to canvass the appeal by way of written Submissions. Only the appellant had, at the time of writing this judgement, filed its submission.

12. The appellant submitted that the assessment of general damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured. That the trial Magistrate ignored the uncontroverted evidence and went on a frolic of his own to conclude that the plaintiff did not deserve to be awarded neither general damages nor special damages only to award the doctors attendance fee despite the evidence before him. He relied on the following authorities in support of his submissions; **Christine Mwigina Akonya v Samuel Kairu Chege, Evans v Teamsters Local Union No. 31 [2008] 1 S.C.R 661, 2008 SCC 20, Mwanasokoni v Kenya Bus Services Ltd [1985] eklr.**

ANALYSIS AND DETERMINATION

13. The first appellate court should re-evaluate the facts afresh and come to its own independent findings and conclusions. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123.**

14. The main issue in contention in this appeal is whether or not the trial Magistrate erred in dismissing the Appellants claim of General Damages and medical expenses.

15. Looking at the trial Court records it is clear that the Appellant did not attach any initial treatment notes. The medical report by Dr. Kiama equally does not state the medical records he relied on to make the medical report. The trial court also found that the P3 form was faint and Part II lacked information on the injuries sustained. These are important foundational documents in a claim for general damages and medical expenses for injuries sustained.

16. None of the Appellant's witnesses adverted to or gave evidence as to the nature of the treatment received by the Appellant at Kenyatta National Hospital. They only stated that the appellant was treated at Kenyatta National Hospital.

17. The elementary principle of law is that he who alleges must prove. See **Section 107(1) (2) of the Evidence Act** that provides thus:

> **"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

18. See also section 112 of the Evidence Act which provides thus:

> **"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

19. Judicial decisions on this point are legion. In **Fadna Issa Omar v Malne Sirengo Chipo & 3 others [2016] eKLR** the court dismissed the plaintiff's case on the basis that he only relied on the P3 form which it found to be unreliable because it was not based on any official record. The court in its determination held as follows;

> **"It is trite law that the burden of proof in any case lies on the person who alleges the existence of certain facts or the person whose case would fail if no evidence was given – See Section 107 and 108 of the Evidence Act. In order to prove her claim, it was incumbent upon the appellant to prove on a balance of probability that not only did the respondents negligently cause the accident subject of the trial but that she sustained the injuries pleaded as a result of the accident for which he was entitled to compensation."**

20. The court in **Fadna Issa (supra)** also relied on the cited decision by Maraga J (as he then was) in **Timsales Limited V Wilson Libuywa Nakuru HCCA No. 135 of 2006** who when considering allegations of injuries sustained in a factory accident stated as follows;

> **"Dr. Kiamba's report does not help the Respondent. 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 examined 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".**

21. Similar sentiments were expressed in the case of **Amalgamated Saw Mills Ltd -vs- Stephen Muturi Nguru Nakuru HCCA NO. 75**

OF 2005, that:

> **"The treatment card was marked for identification as MFI but was not produced. It was the duty of the Respondent to prove his case to the required standard. He should have called the relevant person to produce the said card if the same was generally issued to him ---. The respondent alleged that he was seen by Dr. Omuyoma after more than three years – from the date of the alleged accident --- the evidential value of the medical report is minimal if any."**

22. The case of **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR** which was cited by the appellant is distinguishable from the facts of this case. In the case under reference, the plaintiff only lacked receipts to prove their claim for special damages. He however had the treatment notes and was able to substantiate his claim for General Damages.

23. Needless to state that each case turns on its facts. And this legal reality cannot be expressed better than it was by Andrew Goodman in his learned work, ***How Judges Decide Cases: Reading, Writing and Analysing Judgments***, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009), in which he observes (p.44):

> **"However rarefied and abstruse the legal argument before the [Court], it must be anchored on the facts of the case: while the judges will feel free to expound upon the most general principles in order to provide guidance for the future, <u>the actual decision…will turn on the facts,</u> even if the detail of the argument is quite remote from them"** [Underlining mine for emphasis].

[54] Such is a fundamental principle in adjudication of cases. The approach is certain to lead to a fair, dependable and plausible basis of judgment, as well as set a just and tenable reference-point for the future. Therefore, absence of initial treatment chits or some form of reliable and admissible record or evidence thereto, denies any connexion between the injuries set out in the medical report and the accident as the alleged cause of the injuries. There is absolutely nothing to show that the appellant was treated at KNH. The possibility that the injuries may have been sustained elsewhere other than out of the accident herein is not remote. Consequently, there is no plausible basis for an award in general damages or medical expenses.

24. In the upshot, I find that the trial Magistrate arrived at the right determination. This appeal therefore lacks merit and is dismissed with costs to the Respondent. It is so ordered.

25. Each party to bear their own Cost

Dated and signed at Meru this 14th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of December 2019

L. NJUGUNA

JUDGE