REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 83 OF 2017

IKILO HOLDING CO. LTD.....APPELLANT

-VERSUS-

BENEDICT WAMBUA MUTUA.....RESPONDENT

JUDGEMENT

1. By plaint dated 20/11/2009, the Respondent sought reliefs; namely:-

- Special damages Kshs. 6,050/=.
- General damages for pain, suffering and loss of amenities.
- Costs and interests.

2. The Defendants/Appellants filed joint defence denying the claim.

3. The matter was heard and the trial court held that liability by consent was agreed on 90%:10% in favour of Respondent, general damages Kshs. 350,000/= less contribution 10% Kshs. 315,000/=, Special damages less Kshs. 2,850/=, contribution 10% Kshs. 2,565/=.

4. Being aggrieved by the above decision lodged appeal via memo dated 28/03/2013 according to 3 grounds namely:-

i. THAT the learned magistrate erred in law and in fact by holding that the defendant was not supposed to tender any evidence on liability on the ground of an earlier consent recorded on liability, when there was consent on record allowing the defendant to amend the defence.

ii. THAT the learned magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities in view of the evidence on record.

iii. THAT the learned magistrate erred in law and in fact in failing to consider all the evidence adduced and produced in court by the defendant to wit;

a. The Evidence of DW1 Mr. Jorim Odero that the plaintiff was not treated at Machakos Level 5 Hospital, and that the treatment notes did not emanate from the said institution.

5. During directions the parties consented to canvass appeal via written submissions which they filed and exchanged.

APPELLANTS SUBMISSIONS

6. On 5th May 2010, the parties recorded a consent on liability and apportioned same in the ratio of 90:10 in favour of the plaintiff against the defendant.

7. On 16/09/2011 an application to amend the defence was allowed by consent and the defendants granted leave to file and serve the amended defence. The plaintiff was granted corresponding leave to file and serve a reply to the defence.

8. On 28/2011 the defendant/appellant filed and served the amended statement of defence which pleaded and particularized fraud and misrepresentation on the part of the plaintiff.

9. This was however vitiated on the 16th September 2011 by the consent to amend the defence to plead fraud being the latter consent on record.

10. No reply to the amended defence was filed despite having leave to file an amended defence the plaintiff failed to do so and hence by implication admitted to the contents of amended defence as expressly provided for by the applicable provisions of the law.

11. Indeed your lordship the civil procedure rules 2010 provides as follows;

> ***[Order 2, rule 11.] Admissions and denials.***
>
> 11. (1) Subject to sub rule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.
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> **[Order 2, rule 4.] Matters which must be specifically pleaded.**
>
> 4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality –
>
> *(a)* Which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) Which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) Which raises issues of fact not arising out of the preceding pleading.
>
> ***[Order 2, rule 10.] Particulars of pleading.***
>
> 10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –
>
> (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;…….

12. Further your lordship the Evidence Act Cap 80 LOK at section 61 provides as follows;-

Facts admitted in civil proceedings.

> "No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, **or which by any rule of pleading in force** at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions."

13. Your Lordship we rely on the case of **Mount Elgon Hardware –vs- United Millers Ltd [1996] eKLR**. Where the court of appeal held as follows:-

> "Furthermore the respondent denied any form of negligence on its part and in turn, alleged negligence against the appellant. The respondent properly pleaded the particulars of such negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances, the learned Judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of Order VI Rule 9 (1) of the Civil Procedure Rules."

14. Your Lordship it is our submission that failure of the Plaintiff/Respondent to traverse the amended defence was an admission to the particulars of fraud in the Amended Defence.

15. PW1 (**Benedict Wambua Mutua**) the plaintiff/respondent sought to rely on his sole evidence even as the defence mounted a vigorous denial of his involvement. It was upon the plaintiff in the circumstances to at least invite an independent eye witness to buttress his claim.

16. The plaintiff/respondent did not tender any evidence to prove that he was involved in the accident. He did not even call any police officer to tender evidence linking him to the accident. In his evidence the plaintiff states that he was treated at Machakos Hospital and this was rebutted by a representative from the hospital.

17. He further stated that he did not have the original receipt for the official search of the M/V at KRA and was not quite sure whether he paid the money.

18. PW2 **Doctor Mulwa**, was invited the plaintiff/respondent and he clearly stated that he neither treated the plaintiff nor examined him. That he was only invited to produce the P3 and a medical report prepared by Dr. Kimuyu. When pressed on cross-examination he admitted

that he could not tell what the doctor relied upon while coming up with the contents of the medical report.

19. Be that as it may, it is worth noting that the signature in the medical report purported to be that of Dr. Kimuyu was not his. If indeed the document was not forged, the maker would not have hesitated to produce it.

20. DW1 **John Odere Onyango** was the defendant/appellants witness, he was the deputy records officer at Machakos level 5 hospital. He testified on the basis of the Revocation letter dated 16th May 2012 from Machakos level 5 hospital (D.ext 1) and the hospital out-patient register (D.ext 2). He stated that the plaintiff did not appear in any of the hospital record and as such was not treated at the hospital.

21. The treatment notes were also not authentic since they did not emanate from the said hospital. He also stated that the plaintiff might have colluded with the hospital staff to manufacture the documents.

22. Moreover, he stated that all out-patient must pass through the records department to have their details recorded, and that the claimants' alleged treatment at Machakos level 5 hospital was procedural.

23. Your Lordship, court failed to address the evidence adduced as to the treatment notes that were fraudulent. Evidence on DW1 was clear that the treatment notes did not emanate from the hospital, and court erred in awarding quantum and or failing to take into consideration that the treatment notes that the plaintiff purported to rely on were fraudulent.

24. The respondent in his plaint alleged that she was a fare paying passenger in the ill-fated vehicle; it was therefore incumbent upon the respondent to adduce evidence in proof of involvement. The respondent failed to invite any eye witness to corroborate his involvement in the said accident notwithstanding the fact that his involvement was strongly contested.

25. Your lordship, **Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya** clearly captures these aspects and they provide as follows:-

> **107. Burden of proof** (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
>
> (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.
>
> **108. Incidence of burden**. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> **109. Proof of particular fact**. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. It is our submission the Learned Trial Magistrate failed to consider the defendant s evidence on record by failing to analyze the evidence by DW1 on fraud and entered judgment erroneously.

27. By instituting this suit against the appellant, the respondent, was only trying to import into the Kenyan Legal system the regime of strict liability. Your lordship the issue has been dealt with and settled by the court of appeal and was applied in one of the fairly recent authorities of **East Produce (K) Limited –vs- Christopher Astiado Osiro in Civil Appeal No. 43 of 2001** where it was held that:

> "It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of **Kiema Mutuku –vs- Kenya Cargo Hauling Services Ltd 1991** where it was held that "there is a yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

28. Your lordship, he who alleges must prove and proof of involvement cannot be an exception to this well founded rule. In this authority the honourable court also held with approval the sound holding in the locus classicus cited above. Your lordship, the appellant proved fraud and the respondent did not traverse the same.

29. Your lordship, in **Oluoch Eric Gogo –vs- Universal Corporation Limited [2015] eKLR**, the court re-stated the duty of an appellate court as follows;-

> "As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh persective and with an open mind. As was espoused in the Court of Appeal case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect……..

RESPONDENT SUBMISSIONS

30. The Appellant filed the Appeal and contend that the court erred in finding that there was a consent order on liability and finding that the appellants were 90% liable. They were of the opinion that the defendant was supposed to tender evidence on liability even with the consent on liability as they had been granted leave to file an amended defence.

31. Our submissions are that the consent order recorded in court was never set aside or varied. The appellant herein was well aware of the consent order on liability that was recorded in court on 12/05/2010. That well aware of the said consent order on liability, they only moved the court ot amend their defence but never sought to set aside the orders made on 12/05/2010.

32. That on 16/09/2011, the only orders made were for the appellant's application dated 17/08/2011 be allowed in terms of prayer No. 2.

> **"That the defendant's/applicant's be granted leave to amend their defence in terms of the draft proposed amended defence as attached hereto."**

33. That the said application had no prayer to vary the consent on liability already on record nor was any other application filed for such orders.

34. That the proceedings of the court are clear that based on the consent order on liability, the matter proceeded on hearing and the respondent herein gave evidence on 09/11/2011 (page 68).

35. Counsel present for the appellants only cross examined on the injuries and recovery and never raised any issue on liability and how the accident occurred and the police abstract was produced as Exhibit No. 2. It is clear that this was due to the consent order on liability hat was already on record.

36. That once the plaintiff's/respondent's case was closed, the defendant/appellant called their witnesses on 02/08/2012 and called officer from Machakos Level 5 hospital.

37. On **11/12/2012**, the defendant's/appellant's counsel Mr. Odhiambo appeared in court on **11/12/2012** and indicated on record that although the matter was coming up for further defence hearing, he had no more witnesses to call and proceeded on his own motion to close the defendant's case, and parties were directed to file submissions.

38. It is therefore an afterthought for the appellant to contend that the Honourable Court failed to allow them to call their witness or present evidence on quantum.

39. This being a court of record, we urge the court to consider the proceedings of the court and find that the consent on liability was properly on record and the Trial Court was properly directed/minded to adopt the same during the Judgement as an order of the court.

40. The Appellant contend that they had presented evidence that the respondent was never treated at Machakos level 5 hospital. The plaintiff testified on 09/11/2011 and gave clear evidence that he was indeed treated at Machakos level hospital.

41. Even on cross examination by defence counsel no issues were raised as to the validity of his treatment at Machakos level 5 hospital. The same was produced alongside an x-ray report form as exhibit No. 8. The treatment notes are for **03/10/2009** and **05/10/2009**. No objection was raised to the production or validity of the same.

42. The defendant/appellant called **DW1** who appeared in court with an outpatient register for **03/10/2009** and letter dated **16/05/2012** whose evidence chief was that the respondent's name was not in the register and that the treatment notes were not disclosed and no revenue was recorded.

43. On cross examination the defence witnesses confirmed that the treatment notes produced by the plaintiff did indeed originate from the hospital and the hospital letter head and stamp from the hospital and further that he had no issues with the letterhead and stamp.

44. He also confirmed that the plaintiff/respondent infact went back to the hospital for removal of the plaster of paris and plaintiff was even referred for orthopedic examination. He further confirmed that respondent had visited the hospital for several days. He was not even aware how the patients received the cards at the hospital nor why plaintiff was never called to respond to the hospital to have a say in the issues.

45. The appellants allegations that the respondent was never treated at Machakos level 5 were shattered on cross examination and the plaintiff's case remained unshaken and corroborated by the evidence on record.

46. Part of the record (17) even shows that plaintiff was given a sick sheet on **06/10/2009**.

47. In view of the foregoing submissions, it is clear that the respondent did indeed sustain the following injuries as a result of the accident:-

a. Blunt injury to the left shoulder with tenderness on movement;

b. Blunt injury to the left arm;

c. Fracture of surgical neck of left humerus – slab pop applied; and

d. Left elbow and shoulder tenderness and stiffness (arm sling applied).

48. We submit that the Trial Magistrate was properly guided by evidence on record and his judgement well minded.

49. My Lord, the principles on which an appellate court will interfere with the findings of a trail court on quantum are now well settled. In **Kenya Bus Services & Another –vs- Frederick Mayende (1991) 2 KAR 232**, the court at **page 235** stated:-

> **"The principles on which an appellate court will interfere with a trial judge's assessment of damages are now well settled in Kenya Kneller JA, as he then was, put it thus in Robert Msioki Kilavi –vs- Coastal Bittlers Ltd (1985) 1 KAR 891 at 895:**
>
> *"The court of Appeal in Kenya, then, shoud, as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. Singh –vs- Singh and Handa (1955) 22 EACA 125, 129: Butt –vs- Khan (1977) KAR 1:*

50. Again in **Savana Saw Mills Ltd –vs- George Mwale Mudomo (Reported) (2005)** and **Tridev Construction –vs- Charles Wekesa Kasembeli**, Justice Dulu Ag Judge, as he then was, quoted the findings **in Kemfro Africa Limited t/a Meru Express Services & Another –vs- A.M. Lubia and another (No. 2) [1982-88] L KAR 727** at **page 703** that:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**
>
> **The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

51. The 1st Appellate court duty:

EVIDENCE ADDUCED

52. I am Benedict Wambua Mutua hail from Yatta district. I was involved in the accident in motor vehicle KBH 732Q on 03/10/2009. I was injured on the left hand which had a fracture, chest and face. I was treated at Machakos general hospital where I was treated and discharged. I continued with treatment. I am not fully healed. I can't perform heavy duties with the left hand. I am right handed. I reported the accident at Machakos police station. I was issued with a P3 form. P3 form – PEX 1. I was also issued with the police abstract – PEX 2.

53. I was later examined by Dr. Kimuyu who prepared for me a medical report – MFI 3. The copy of the records showed that the 1st Defendant is the registered owner of the motor vehicle. Copy of records – PEX 4. I paid Kshs. 500/= for the records.

54. Copy of records – PEX 5. I paid Kshs. 200/= for the police abstract. Receipt – PEX 6. I incurred medical expenses. These are receipts for Kshs. 2,360/=. Bundle of receipts – PEX 7. I pray for damages and costs for the suit.

55. I am administration police officer. I was still an officer before the accident. I am still performing my duties. I am healed. PEX 5 is a copy. I paid Kshs. 500/=. I don't have the original in court.

56. I am doctor Mulua Andrew Mutune. I am the DMOH in Mbooni. I hold a degree in medicine and surgery. From January 2009 to December 2010, I was at Machakos general hospital. I have a medical report to the plaintiff here. It was prepared by doctor Judith Kinyu. I worked with her at Machakos level 5 hospital for two years.

57. I work with her at east end medical clinic. She is pursuing a master in university of Nairobi. I know her handwriting and signature. He had a history of road traffic accident on 03/10/2009.

58. He sustained blunt injury to the left shoulder, left arm and fracture of the neck of left humerus. He was treated at Machakos general hospital. He complained of pain on the left hand of the scene of the fracture. He sustained severe bruise of soft tissue injuries. He was still on follow up in orthopedic clinic.

59. Medical report – PEX 3. The doctor must have relied on the treatment notes as she refers to the initial treatment. It is possible that the plaintiff has not fully recovered. The letterhead is from Machakos level 5 hospital.

60. I worked at Machakos for about two years. In 2009, I was still at the hospital. There are no prices for medical report at the hospital. People used to pay Kshs. 200/= for the medical report. The money should go to the hospital. In this case, he money should have gone to hospital.

61. If a client request for a medical report of the time of filling the P3 form, he may pay for the P3 form. When a patient is treated, there is a record of all dispensed drugs. Alice Kitumbi is the health administration officer at Machakos general hospital. A copy of the P3 form at the hospital. The P3 forms are kept at the record. The administration is the one able to respond to the question.

62. The heading on the P3 form is not clear. There was a problem in issuance of medical report. The doctor would fill the medical report and take to the secretary for typing. Witness refers to a letter dated 11/05/2012. It states that the plaintiff's copy of P3 form was not found at the hospital. It further states that the medical report did not belong to the hospital. I did not see the attached medical report form in the letter

dated 11/05/2012. Letter dated 11/05/2010 – DMFI 1.

63. I have never seen the specimen medical report on DMFI 1. The typing was done at the hospital. The doctor does not deal with the records office. The documents would normally be filled before payment. Later there was a memo that the same to be filled after payment. The letter head is for the hospital.

64. I am John Odere Onyango. I work with the ministry of medical service Machakos level 5 hospital. I have a letter from the hospital and a copy of the outpatient register for 03/10/2009. The letter is dated 16/05/2012 and written by the medical supretendant. I have come on behalf of the medical supretendant. He has delegated to me.

65. According to the letter the drugs on the treatment notes were not disclosed and no revenue was recorded for the alleged chemist. Letter dated 16/05/2012 – DEX 1. He had a copy of the outpatient book pw1 name did not appear in the register. His name does not appear in the register.

66. On cross-examination, he said that, he had no identification card to show he worked at the hospital. He did not have the national identity card. He saw the treatment notes for the plaintiff. He said that, the treatment note did originate from the court. It was a card. It had the hospital letterhead. It had a stamp for the hospital. I had no issues with the letter and the stamp. It did not appear in the register and had no receipt for payment. The treatment cards are not mostly stamped. He could not tell how many times the patient came to the hospital as the first visit was not recorded.

67. The stamp was for Machakos general hospital dated 06/10/2009. The plaintiff came for removal of P.O.P.

68. According to the treatment notes, the patient came to hospital for several days. The plaintiff was not called to respond to the issues. The information is written in the records by officers from the hospital. He couldn't tell how the patient received the cards.

ISSUES, ANALYSIS AND DETERMINATION

69. After going through the materials before me I find the issues arising are;

i. Whether there was consent on liability?

ii. If above is affirmative, was award inordinately high?

iii. What was the order as to costs?

70. On 12/05/2010, the parties are recorded to have recorded consent on liability apportioned at 90%:10% in favour of the Plaintiff/Respondent. The both sides advocates were present in court.

71. On 16/09/2011, the parties consented to leave being granted to the Appellants/Defendants to file an amended defence.

72. The said order of amendment did not supplant the consent of 12/05/2010 or vary or set aside the same.

73. When matter was heard, it was thus unnecessary to belabor on the point of liability on the face of the subsisting consent aforesaid. The principles of setting aside a consent judgement are well known. No attempt was made to supplant the same consent. Thus the trial magistrate was not to blame when he adopted same consent on liability as part of his judgement.

74. On quantum, I find that the appellant apparently abandoned the ground on quantum as submissions dated 14/11/2017 indicated that the appellant appeal was mainly on liability and thus went ahead to submit on the same only.

75. In any event the appellant did not demonstrate that the award made by the trial magistrate was so inordinately high that it warranted interference by this court.

76. In the premises the court finds no merit in appeal and makes the following orders:-

1. The appeal is dismissed.

2. Parties to bear their own costs.

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF APRIL, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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