



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 58 OF 2015

DIANA GACHORI MUGAMBI.....1ST APPELLANT

DORIS MUGAMBI.....2ND APPELLANT

VERSUS

MARY NGIMA WANJAU.....RESPONDENT

(Being an appeal from the Judgment of Hon C. Obulutsa (Mr), Ag Chief Magistrate (Ag CM) at the Chief Magistrate's Court at Milimani in Civil Case No 1704 of 2010 delivered 20th January 2015)

JUDGMENT

INTRODUCTION

1. On 17th May 2012 and 25th September 2013, the Appellant's and Respondent recorded consents in which they agreed that liability could be apportioned at 70% - 30% in favour of the Respondent herein and that General damages could be assessed at Kshs 800,000/= and thereafter parties proceed for formal proof on the issue of special damages.

2. In their Complaint dated 18th March 2018, the Appellants had sought Kshs 645,582.66 as Special damages. The computation was as follows:-

a) Police Abstract Report	Kshs 350,000.00
b) Copy of Records	Kshs 1,500.00
c) Medical Expenses	Kshs 327,982.66
d) Medical Report	Kshs 9,000.00
e) Transport to and from hospital	Kshs 27,900.00
f) Future medical expenses	<u>Kshs 280,000.00</u>

Kshs 645,582.66

3. In his decision of 20th January 2015, Hon C. Obulutsa (Mr) SPM, the Learned Trial Magistrate entered judgment in favour of the Respondent against the Appellant for Kshs 446,657.28 made up as follows:-

Special damages	Kshs 645,282.60
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Less Kshs 7,500.00

Kshs 638,082.60

Less 30% contribution Kshs 19,424.78 (sic)

Kshs 446,657.28

4. Being aggrieved with the said judgment, on 20th January 2015, the Appellant filed its Memorandum of Appeal dated 19th February 2015 that was lodged in court on the same date. It relied on fourteen (14) Grounds of Appeal.

5. The Appellant's Written Submissions were dated 17th September 2018 and filed on 18th September 2018 while those of Respondent were dated 31st October 2018 and filed on 2nd November 2018. Notably, at the time this court reserved its Judgment on 19th September 2018, the Respondent had not filed her Written Submissions. Subsequently, the same were placed on the court file pursuant to the consent letter dated 31st October 2018 and filed on 2nd November 2018 that was duly executed by advocates for the Appellants and advocates for the Respondent.

6. When the matter came before the court on 6th November 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

9. Having looked at the parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

1. Whether or not the Respondent was entitled to a sum of Kshs 327,982.66, that had been paid for her by her employer and Britam Insurance Company Ltd;

2. Whether or not the Respondent was entitled to a sum of Kshs 280,000/= being future medical expenses;

3. Whether or not the Respondent was entitled to transport expenses.

10. The court therefore deemed it necessary to deal with the issues under the separate heads shown hereunder.

I. REIMBURSEMENT OF MEDICAL EXPENSES

11. Grounds of Appeal Nos (2), (3), (4), (5) and (6) were dealt with under this head.

12. The Appellants argued that the Learned Trial Magistrate erred when he failed to take into account that the sum of Kshs 327,982.66 that the Respondent had pleaded for medical expenses had already been paid by M/S Britam Insurance Company Ltd and the Respondent's employer and consequently, awarding the said sum to the Respondent amounted to unjust enrichment as she had admitted that she only catered for part of her payment with the rest being paid by her employer and the Insurance Company.

13. They averred that since Irene Odhiambo (hereinafter referred to as “PW2”) confirmed that the firm of M/S Kimani Karimi & Co Advocates where the Respondent was an employee paid sums of Kshs 111,611/= and Kshs 62,200.66 to Menelik Hospital and Karen Hospital, there was no way that the Respondent could have claimed for the said monies unless the same was under subrogation rights.

14. They relied on the case of **Pitty Gathigia Baaru & Another vs Kenya Bus Services & Another [2005] eKLR** where it was held that the Defendant therein could only pay a claim for subrogation in the name of the plaintiff therein if witnesses attended to indicate the sum that had been paid and that if the sums were deducted from an employee's salary, then evidence had to be led to prove the same.

15. They also referred to the case of **Mehari Tewolodge t/a Mehari Transporters Ltd vs Damus Muasya Maingi [2013] eKLR** where Thurania Jaden J declined to award the plaintiff therein medical expenses that had been paid on his behalf by the company because he did not adduce his pay slips to show that indeed his employer had deducted the same from his salary.

16. In her evidence, the Respondent stated that she was operated on by Dr Gakuru. She confirmed that she had a medical cover for Kshs 300,000/= from Britam Insurance Company Ltd and that her employer paid the balance so that she could be discharged. She stated that her employer paid Kshs 6,300/= which she had to pay back as a loan.

17. This court perused copies of the receipts on record and did not see any documents showing payment of Kshs 327,982.66/=. What was evident, however was that the Schedule from Britam Insurance Company Ltd showed that the Respondent had an annual limit of Kshs 300,000/=. The letter dated 5th May 2014 by M/S Kimani Kairu & Co Advocates showed that it paid a balance of the medical bill for The Karen Hospital Kshs 63,200.66/= that was not paid by Britam Insurance Company Ltd.

18. Notably, the claim for medical expenses was a special damage that had to be strictly proven. In the absence of any documentary evidence that the Respondent was deducted the said sum of Kshs 63,200.66/=:, this court was persuaded by the Appellant's submissions that the sum of Kshs 327,982.66/= was not payable to her.

19. The issue of subrogation did not arise as the Insurance company paid a sum upto Kshs 300,000/= which was the limit of the medical cover for the Respondent herein. It is for that reason that although the court noted the submission by the Respondent that the claim had not been brought under the subrogation rights and the case of Leli Chaka Ngoro vs Maree Ahmed & Another [2017] eKLR that she relied upon in this regard, the issue of subrogation was not applicable in the circumstances herein.

20. In the premises foregoing, Grounds (2), (3), (4), (5) and (6) were merited and are hereby allowed.

II. FUTURE MEDICAL EXPENSES

21. Grounds of Appeals No (7), (8) and (9) were dealt with under this head.

22. The Appellants submitted that the Learned Trial Magistrate erred when he awarded the Respondent Kshs 280,000/= for future medical expenses on the ground that the same was speculative. They stated that she only produced a letter from Dr Arif which had set out the said sum as the cost of future medical expenses.

23. They referred this court to the case of Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR where the court termed a claim for future medical expenses to have been purely speculative.

24. In her evidence, the Respondent said future medical expenses were assessed at Kshs 280,000/=. She contended that the Appellants cross-examined PW 2 on Dr Arif's letter and consequently the same formed part of the evidence the court would rely upon to adjudicate the case. It was her assertion that this was not an issue that the Appellants could bring at the appellate stage.

25. She relied on the case of Kenya Bus Services Ltd vs Gituma [2004] EA 91 which Kasango J cited with approval in the case of KIPMelamine Ltd and 2 Others vs Violet Waitiri Gichia [2017] eKLR and allowed a claim for future medical expenses.

26. She was categorical that she had discharged her burden of proof as was addressed in the case of Kenchic Limited vs John Wamahiu Kimunge [2018] eKLR and that consequently, her claim for future medical expenses ought to be upheld.

27. This court looked at the court record but did not see the letter that Dr Arif was said to have written. However, it went to the record of the lower court and found the said letter dated 4th September 2009. The same was tendered in evidence by the Respondent herein.

28. There was no indication in the proceedings if the attendance of Dr A. I. Arif was dispensed with. He was the author of the letter and accordingly, he was the only one who could have tendered in evidence, the said letter.

29. Indeed, Section 63(2) (d) of the Evidence Act Cap 80 (Laws of Kenya) is very clear that only the maker of a document can adduce the same. The said Section provides as follows:-

“Oral evidence must in all cases be direct evidence.

With reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable”.

30. In the absence of any evidence that the presence of Dr Arif could not be procured, this court found that the assertion that the Respondent would require future medical expenses remained just an assertion. Indeed, the opinion of Dr Arif could only have been relied upon if both the Appellants and the Respondent had agreed that his letter be admitted without calling him.

31. In the event Dr Arif would have testified justifying the future medical expenses, and the Appellants failed to call another doctor to rebut his opinion, then this court would have accepted the said figure on the ground that his evidence would have remained uncontroverted.

32. In the premises foregoing, this court found that Grounds of Appeal No (7), (8) and (9) were merited and the same are hereby upheld.

III. TRANSPORT EXPENSES

33. Grounds of Appeal No (10) and (11) were dealt with under this head.

34. The Appellants submitted that the Respondent failed to mitigate her losses by incurring high transport expenses. They took the view that since the Learned Trial Magistrate disallowed some receipts for transport, then he ought to have rejected the claim for transported expenses.

35. They added that the receipts for the sum of Kshs 20,400/= were not stamped in accordance with Section 19 of the Stamp Duty Act Cap 480 (Laws of Kenya).

36. On her part, the Respondent argued that the Appellant failed to appreciate that Section 19(3) (b) of the Stamp Duty Act and Section 201 of the Stamp Duty Act allows a party to be given time to have its documents stamped.

37. It was her contention that the Appellant did not raise the issue during trial and consequently they could not do so at this stage. She relied on the case of **Paul N Njoroge vs Abdul Sabuni Sabonyo [2015] eKLR** where the Court of Appeal held that:-

“...the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof”.

38. Unfortunately, this court did not have the benefit of seeing the lower court file in the case of **Paul N Njoroge vs Abdul Sabonyo** (Supra) to establish under what circumstances the trial court rejected the receipts because they were not stamped under the Stamp Duty Act.

39. In this case, the Respondent did not seek an opportunity to have her receipts stamped. It was her case. It was not for the Appellants to have jolted the memory of her advocates. At all material times, the burden of proof lies on a plaintiff to prove her case and never shifts on a defendant.

40. Having said so, it is important to point out that the Appellants never raised the issue of the receipts not having been stamped under the Stamp Duty Act during trial. They only raised the issue in their Written Submissions. As they did not raise the issue during trial, they can only be said to have waived their right to object and/or acquiesced to the reliance of the said receipts.

41. Allowing the Appellants' argument at this stage would clearly prejudice the Respondent as she would have stamped the receipts before proceeding with her case had the Appellants raised an objection then.

42. This prejudice was addressed in the cases of **Felicina Muthoni Wang'ondy vs Moses Amadi & Another [2016] eKLR** and **Victoria Mwhiki Muchira and 2 Others vs Wanjiku Mwenja Mwangi and Another [2016] eKLR** by Aburili and Thurania Jaden J respectively where they rejected the argument that the trial courts could not rely on receipts that were not stamped under the Stamp Duty Act and proceeded to rely on the same.

43. Bearing in mind the injuries the Respondent sustained and the fact that she sought treatment from 5th April 2008 when the accident occurred until about March 2009, it was the view of this court that a sum of Kshs 20,400/= for transport was not unreasonable.

44. The Appellants would only have benefited from their argument had they objected to the receipts not having been stamped under Section 19 of the Stamp Duty Act and the Respondent failed to have the same stamped and opted to proceed with the trial.

45. Grounds of Appeal Nos (10) and (11) were not merited and the same are hereby disallowed.

DISPOSITION

46. For the foregoing reasons, the upshot of this decision was that the Appellants' Appeal that was lodged on 19th February 2005 was partly successful. In the circumstances foregoing, the judgment of the Learned Trial Magistrate for the sum of Kshs 446,657.28 is hereby set aside and/or vacated and in its place it is replaced with judgment in favour of the Respondent against the Appellants, jointly and severally for the sum of Kshs 21,070/= made up as follows:-

a. Police Abstract Report	Kshs 200/=
b. Copy of Records	Kshs 500/=
c. Transport to and from hospital	Kshs 20,400/=
d. Medical Report	Kshs 9,000/=

Kshs 30,100/=

Less 30% contributory

Negligence

Kshs 9,030/=

Kshs 21,070/=

Plus costs and interest thereon at court rates from date of filing suit until payment in full.

47. Each party to bear its own costs of the Appeal.

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of November 2018

J. KAMAU

JUDGE