



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 106 OF 2013

BETWEEN

JOHN OLUOCH OTIENO APPELLANT

AND

SWAN CARRIERS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Sala, RM dated 23rd October 2013 at the Chief Magistrates Court at Kisumu in Civil Case No. 151 of 2011)

JUDGMENT

1. The issue in this appeal is whether the trial magistrate erred in dismissing the appellant's case on the ground that there was discrepancy between the injuries pleaded in the plaint and the evidence adduced by the appellant.

2. The appellant filed suit against the respondent seeking damages for injuries sustained in an accident which took place on 4th October 2010. He pleaded that while lawfully riding a bicycle within Kisumu town, the respondent's motor vehicle registration number KBK 144 veered off its lane and hit him. The respondent filed a defence denying liability and alleging contributory negligence in the alternative. In due course the issue of liability was settled by consent with the respondent shouldering 60% liability.

3. The matter proceeded for assessment of damages. The appellant pleaded that he sustained the following injuries;

- Fracture of the left medial malleolus bone
- Injury to the chest
- Injury on the right ankle joint with a cut wound
- Injury on the right knee with cut wound
- Cut wound on the right leg

4. The appellant testified that after he was hit, he fell on his right side and sustained a fracture of the right leg, his ribs were injured and that he had bruises on his legs. When cross-examined he told the court that his right leg and his ribs were fractured and those were the only injuries. Dr Were Okombo testified and produced a report dated 16th November 2010. He examined the appellant and confirmed that the appellant sustained injuries on the chest, right ankle joint with cut wound, injury on the right leg with cut wound and injury on the right knee. He also examined the X-rays which showed that the appellant sustained a fracture of the right fibula bone malleolus (the ankle joint). The report by Dr Z. Gaya dated 20th March 2012 was produced by consent of the parties. He examined the appellant and confirmed that

the appellant suffered soft tissue injuries on the chest and a compound fracture of the right ankle joint. He observed that the fracture had healed well although it was possible that the appellant would develop post traumatic osteoarthritis of the right ankle joint. He noted that there was no permanent disability.

5. After considering the evidence, the trial magistrate accepted the respondent's submission that the appellant's testimony was at variance with pleading. He noted that the plaintiff stated in his testimony that he sustained a fracture on the right leg yet in cross-examination he stated that he had a fracture on the left leg while both Dr Gaya and Dr Okombo confirmed that he had a fracture on the right leg. The trial magistrate dismissed the case on the ground that the appellant had not proved its case on the balance of probabilities. He held that;

*It is clear that the plaint herein is defective; as it leaves the Court confused on whether (the) injury sustained was on the left leg or right leg. It is also clear that the plaintiff never amended his pleadings to conform to the evidence adduced. The court concurs with the defendant that it is trite law that he who alleges must prove; and the authority of **Wareham t/a A. F. Wareham and 2 Others v Kenya Post Office Savings Bank [2004] 2KLR 91** is clear on that. In that case the judge(s) held that;*

The burden of proof is on the plaintiff, and if the evidence does not support the facts pleaded then the party with the burden of proof should fail.

The plaintiff herein has not proved that he sustained injuries on his left leg as claimed in the plaint. There is also a wide discrepancy on the injuries as stated in his plaint, medical reports, viva voce evidence of the plaintiff and his cross-examination in court; as enumerated herein above.

6. In the memorandum of appeal dated 5th November 2013, the appellant contended that the trial magistrate erred in law and in fact in finding that there was a wide discrepancy on the injuries pleaded by the appellant and his evidence. The appellant also contended that the injuries disclosed in the evidence and medical reports pointed to the fact that the appellant sustained an injury to the right and not the left leg. Further that the trial magistrate was wrong to dismiss the suit when there was evidence that the appellant sustained other injuries which were pleaded and proved. Mr Maube, counsel for the appellant, submitted that the variance between the evidence and the pleading was insignificant and not prejudicial and that the appeal should be allowed.

7. Ms Aron, counsel for the respondent, supported the decision of the trial court and reiterated the submissions made before the trial court. The respondent's case was that the pleadings disclosed the injuries sustained by appellant and the appellant had a duty to lead evidence consistent with the pleading otherwise the case should fail. The respondent contended that it was not automatic that once parties had agreed on liability then quantum must be awarded and in this case the injuries pleaded were not proved hence the case was properly dismissed.

8. At the heart of this appeal is the function of pleadings. In **Simon Muchemi Atako & Another v Gordon Osore NRB CA No. 180 of 2005 [2013]eKLR**, the Court of Appeal discussed the function of pleadings and whether departure therefrom is fatal to the case. It observed as follows;

*In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In **Esso Petroleum Company Limited v Southport Corporation [1956] AC 218**, Lord Normand expressed himself as follows on the object of pleadings:*

"The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."

*In **Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634**, the respondent's evidence concerning the occurrence of an accident was a departure from its pleadings in the statement of defence and counterclaim. The Supreme Court of Uganda held that the departure from*

pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings.

9. Applying these principles to this case, the issue of liability had already been agreed upon hence there was no dispute that the appellant had been injured in the accident. The appellant testified and so did Dr Okombo. The respondent referred the appellant to Dr Gaya who confirmed the injuries sustained and his report produced by consent. If the purpose of pleadings is to enable the respondent appreciate the case it is to meet, can it be said that the respondent was misled when the injuries sustained by the appellant were plain and clear? I hold that the departure was neither prejudicial nor significant to warrant dismissal of the claim. Moreover, the appellant sustained more than a leg injury. In the event the trial magistrate in felt that because of variation of evidence on the issue of the foot injury, it was open to disregard that injury and assess damages based on the other undisputed injuries. It is clear that the appellant sustained a fracture of the right ankle joint and soft tissue injuries. The learned magistrate erred by elevating a technical requirement into a fetish.

10. In addition to this general principle, I would be remiss if I did not draw on the authority of the **Article 159(2)(d)** of the Constitution which provides that justice shall be administered without undue regard to technicalities. I find that the to dismiss a suit on account of an insignificant error in the pleadings when the evidence is clear, undisputed and is not prejudicial to the other side as is demonstrated in the circumstances of this case undermines the constitutional principle. It is on these grounds that I allow the appeal.

11. The trial magistrate did not assess the damages he would have awarded had the suit succeeded. It is accepted practice that even if a court dismisses a suit for damages, it is desirable that the court should assess the damages that it could have otherwise awarded, the dismissal of his suit notwithstanding to enable the appellate court deal with the matter with finality. In ***Selle v Associated Motor Boat Company Limited [1968] E.A. 123, Sir Clement De Lestang, VP*** expressed himself thus on the subject:

It is however unfortunate that the learned Judge did not assess the damages as the case will now have to go back for that to be done. It is always advisable for a Judge of first instance to decide all the issues raised in the case before him so that further expenses to the parties and further delay may be avoided in the event of the Court of Appeal having to adopt the course which we must adopt in the present case. Had this been done it would not have been necessary to send the case back to the High Court for damages to be assessed thus increasing the large costs which the parties have already incurred ...

12. Section 78 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) outlines the powers of the appellant court as follows;

78(1) Subject to such conditions and limitations as may be prescribed, an appellant court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

13. In addition, **rule 42 sub-rule 32** of the *Civil Procedure Rules* provides as follows;

32. The court to which an appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondent may not have filed any appeal or cross-appeal.

14. The provisions I have cited empower this Court as an appellate court to step into the shoes of the trial court and adjudicate on issues that the trial court ought to have decided. Whether the court should proceed to assess damages depends on the circumstances of the case. I have taken into account the fact that the cause of action arose in 2010 and the suit was filed in 2011. The case was heard and finalised in 2013 and this appeal had been disposed of in 2016. Given the lapse of time, the nature of the claim and in order to reduce the costs to the parties I think it is in the interests of justice for this court to assess damages based on the evidence and written submissions on record.

15. The appellant submitted that a sum of Kshs. 1,000,000/- was reasonable based on ***Simon Githaiga Munyoki v Anton Nyunguto Wachira* NRB HCCC No. 53 of 1998 (UR)** where the plaintiff sustained a head concussion, soft tissue injury to the chest, small cut wounds over the left forearm and both hands and a compound fracture of the right tibia and fibula and was awarded Kshs. 450,000/- as general damages in 2000. He also cited ***Joseph Thuita v David Kahiu Kimani & Another* NRB HCCC No. 431 of 1996 (UR)** where the court awarded Kshs. 300,000/- in 2000 for a compound fracture of the right tibia and fibula, injury to an incisor leading to its removal and soft tissue injuries to the right arms and chest wall.

16. The respondent submitted that Kshs. 200,000/- was reasonable in the circumstances. It relied on ***Arkipo Odhiambo Otieno v Kenya Bus Service* NRB HCCC No. 1304 of 2004[2005]eKLR** where the plaintiff suffered a fracture of the right femur and was awarded Kshs. 150,000/- as general damages in 2005. Its counsel also cited ***Kiwanjani Hardware and Another v Nicholas Mule Mutinda* MKS HCCA No. 16 of 2008 [2008]eKLR** where the claimant suffered blunt injuries on the head, neck, left shoulder, chest, forearm and a deep penetrating wound on the left leg with cut wounds on the same leg and was awarded Kshs. 150,000/- in 2008. The respondent also cited the case of ***Kisa Stanley Maore v Geoffrey Mwenda*, NYR HCCA No. 147 of 2002(UR)** but did not provide a copy of the case.

17. I find that the plaintiff sustained soft tissue injuries and a fracture of the right ankle joint. The two doctors who examined him confirmed that he had healed well and although there was a possibility of developing osteoarthritis in future, there was no indication of any permanent disability. The decision cited by the appellant and his proposal was way out of proportion to the injuries sustained while the decisions cited by the respondent are more reflective of the injuries sustained by the appellant. I therefore accept the submission by the respondent that **Kshs. 200,000/-** would be a reasonable award for general damages.

18. In the result the appeal is allowed and the judgement of the subordinate court dismissing the suit is set aside and substituted with the following award;

General Damages	Kshs. 200,000.00
Less 40% Contribution	Kshs. 80,000.00
Total	Kshs. 120,000.00

19. The sum of **Kshs. 120,000/-** shall accrue interest from the date of judgment in the subordinate court. The appellant shall have the costs of the suit in the subordinate court and of this appeal.

DATED and DELIVERED at KISUMU this 3rd day of October 2016.

D.S. MAJANJA

JUDGE

Mr Maube instructed by Bruce Odeny and Company Advocates for the appellant.

Ms Aron instructed by Okong'o Wandago and Company Advocates for the respondent.