



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU, J.J.A & ONYANGO OTIENO, AG.JA)

CIVIL APPEAL NO. 53 OF 2003

BETWEEN

MOSES KIPKOLUM KOGO APPELLANT

AND

NYAMOGO & NYAMOGO ADVOCATES RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Justice Githinji)
dated 22nd day of May, 2001**

in

H.C.C.C. NO. 2878 OF 1998)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the Superior Court (Githinji, J – as he then was) delivered on 22nd May, 2001 in which the learned judge dismissed the appellant's suit. The appellant herein, Moses Kipkolum Kogo sued the respondent, M/s Nyamogo & Nyamogo Advocates claiming Shs 2,084,726/= for professional negligence. The genesis of this claim was High Court Civil Case No 4925 of 1989 (*Kogo v David Malakwen*) in which the appellant herein claimed damages against David Malakwen arising from a traffic accident in which the appellant sustained injuries. The appellant instructed the respondent to act for him in that civil suit. Before the suit was heard, the respondent applied for leave to amend the plaint to include a claim for special damages ie (loss of income to the tune of Shs 2,052,000/=.) As there was no objection to the plaint being amended, the trial judge (Juma, J) duly amended the plaint and proceeded to hear the suit.

In his evidence before Juma, J the appellant (as the plaintiff) testified, among other things, that he was earning Shs 9,000/= gross per month; that he was then 36 years old; that his employer terminated his services on 2nd August, 1991 and that he was entitled to retire at the age of 55 years. On being cross-examined, the appellant said that he did not have a letter confirming his salary. The hearing was concluded by advocates for both parties filing their written submissions. The trial judge delivered his judgment on 31st March, 1998 in which judgment he awarded the appellant Shs 750,000/= as damages for pain and suffering and loss of amenities, Shs 35,253/= as hospital fees and Shs 16,500/= as doctors fees. The learned judge disallowed the appellant's claim for loss of earning on the ground that there was

no proof.

Not being satisfied with that award by Juma, J, the appellant instructed his lawyers (respondent herein) to appeal against the award of Shs 750,000/ =. The respondents firm duly filed an appeal on behalf of the appellant – being Civil Appeal No 74 of 1998. That appeal was heard and determined by this Court and in its judgment delivered on 5th November, 1998 the appellant’s appeal was dismissed. On the claim for loss of earnings, this Court stated:

“Being dissatisfied, the plaintiff has appealed to this Court and two grounds of appeal have been preferred. First, it is contended that the learned judge erred in dismissing the appellant’s claim for loss of earnings. But there was no evidence for such a loss and, in our judgment, the learned judge was quite right in disallowing this claim for lack of proof”.

With the dismissal of the appellant’s appeal it appeared as if the appellant’s battle had come to an end. That however, was not the case since the appellant decided to turn against his own lawyers. To do so the appellant filed High Court Civil Case No 2878 of 1998 against the respondent. In that suit it was the appellant’s contention that the respondent firm of advocates was guilty of professional negligence. This is the suit that came up for hearing before Githinji, J (as he then was). The hearing commenced on 28th February, 2001 when the appellant testified in a bid to prove his case against the respondent. After hearing the evidence from both sides the learned judge delivered his judgment on 22nd May, 2001 dismissing the appellant’s suit. In dismissing the appellant’s suit, the learned judge stated, inter alia:-

“Plaintiff had the knowledge at least on the morning of 24th February, 1998 that documentary evidence was necessary. He knew that he did not have the documentary evidence. From the many correspondence he wrote to his advocates and to Court, he is an enlightened person. He did not instruct his advocates to apply for adjournment before trial and elected to proceed with his claim without documents. Regarding the negligent handling of the appeal, it is clear from the judgment of the Court of Appeal that the Court of Appeal dealt with the appeal on its merits. It is not any conduct by defendant which caused the appeal to be dismissed. Could the defendant have applied to call fresh evidence in the Court of Appeal? There are strict conditions which must be satisfied before any Court including the Court of Appeal can allow a party to call additional evidence. In the present case, plaintiff agrees that defendant was reluctant to file appeal and that plaintiff had put pressure on him to file the appeal. Plaintiff does not say that he gave instructions to the defendant to apply in the Court of Appeal for leave to adduce additional evidence. It is only in unusual cases that an Appellate Court can re-open the assessment of damages.

It is unlikely that any application to adduce fresh evidence in the Court of Appeal and to re-open the assessment of damages would have succeeded in the circumstances of this case, more particularly the fact that the dismissal of the plaintiff did not arise after the judgment of the High Court and the fact that plaintiff had an opportunity to produce documentary evidence in High Court which opportunity he did not utilize before the hearing.”

Having so held the learned judge dismissed the appellant’s suit against the respondent. It is from that judgment that the appellant lodged his appeal citing eight grounds of appeal.

The appellant who had now decided to act in person must be commended for preparing a very comprehensive and clear record of appeal and for making very able submissions before us during the hearing of this appeal.

The gist of this appeal, if we understood the appellant well, was that in his earlier suit in the High Court he had sought special damages by way of loss of income which should have been proved by way of documentary evidence but due to his lawyers’ (respondent’s) negligence he (appellant) lost his case. It was the appellant’s view that the respondent was guilty of gross negligence or was ignorant of elementary matters of law by his failure to advise him on what documents to produce at the hearing of the case. The appellant also attacked the respondent’s manner of handling Civil Appeal No 74 of 1998 in that he included vague grounds of appeal in contravention of rule 84 of the Court of Appeal Rules. In the end the appellant urged us to set aside the judgment of the Superior Court and in its place substitute a judgment in

his favour.

Mr Onsando, for the respondent, submitted that as the appellant did not have evidence to prove loss of earnings that was his own failure for which he cannot blame his advocate as it was not the duty of the advocate to produce evidence.

As a first Appellate Court, it is our duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make appropriate conclusions about it, but remembering that we have not seen or heard the witnesses and making due allowances for this (see *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Williams Diamonds Ltd v Brown* [1970] EA 1). In the appeal before us, we have looked at the pleadings and the evidence adduced in the Superior Court and clearly the issue was whether or not the respondents firm of advocates was guilty of professional negligence. Since it was the appellant who alleged professional negligence it was upon him to prove it. His view was that as he claimed special damage in the earlier suit, it was upon the respondent to advise him on what documents to produce in evidence. It was also the appellant's case that the respondent was negligent in preparation of the memorandum of appeal. In his evidence in chief this is what the appellant stated in the Superior Court:-

“..... the respondent failed to exercise due (sic) and attention while drafting the memo of appeal as was required and expected of a person of his professional standing and as an advocate of the High Court of Kenya, respondent negligently drafted the memorandum such that it contained vague and irrelevant grounds contrary to rule (sic) of the Court of Appeal rule 84 in particular. I have already filed a memo of appeal which was filed in the Court of Appeal I produced as exhibit (ex 3). I have annexed a copy of the judgment of the Court of Appeal which I produce as exhibit (Ex 4) I now refer to para A of the plaint showing what defendant should have claimed - total Shs 2,084,726. I was earning Shs 9,000/= per month. I would have worked for 19 years before reaching retirement age. So loss of earnings would (sic) Shs 9,000 x 12 x 19 which is Shs 2,052,000. Exhibit 1 shows that I was earning Shs 7,554 per month. I have added Shs 1,116 as for amount of inflation. The letter says that what my employer is now paying for the job I was doing is Shs 18,787 per month. I spent Shs 18,275 for filing the appeal.”

On being cross-examined on the issue of necessary documents to prove his loss of earnings the appellant said: -

“On 24th February, 1998, I did not have my pay slips. True that my employer was not giving me pay slips. I used to sign for the salary in the pay roll. True on 24th February, 1998 I had no documents to prove my earnings”.

Pausing here for a moment, it may be desirable to consider the issue of loss of earnings. Here, it was upon the appellant to prove his case as regards loss of earnings. The starting point would have been his salary at the material time. Obviously, he needed some documents to show how much he was earning. In his own evidence, he admitted that he did not have pay slips and that he used to sign for the salary in the pay roll. He put the blame on the respondent. The learned judge considered this issue and came to the conclusion that the respondent was not negligent.

As regards the preparation of the memorandum of appeal, it was the appellant's contention that the respondent was negligent. It transpired that after the judgment of Juma, J in HCCC No 4925 of 1989, it was the appellant who brought pressure on the respondent to file the appeal which was dismissed and we have already set out elsewhere in this judgment what this Court said in that appeal.

On the contentious issue of an advocate's negligence towards his client and the basis for liability, we wish to point out that in *Champion Motor Spares Ltd v Phadke and others* [1969] EA 42 the predecessor of this Court held, among other things, that an advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice.

We have considered very carefully the conduct of the respondent in handling the appellant's case before Juma J up to the filing and handling of Civil Appeal No 74 of 1998 and it is our considered opinion that

we decipher nothing close to professional negligence. It was not the duty of the advocates to help the appellant in gathering the evidence with which to prove his case. He himself said he was not receiving pay-slips and when cross-examined he did not say that the pay-roll through which he received his salary was still available and could be produced. So that even if the respondent had told him to bring his pay-slips, the appellant could not have done so because they were not there. We find no fault in the judgment of Githinji, J and it follows that the appellant's appeal must fail. We were urged to declare the appellant as a vexatious litigant. In our view, the appellant is not a vexatious litigant but a zealot in pursuing what he thinks to be his legal rights. In this appeal, we are satisfied that there is no merit in this appeal and we accordingly order the same to be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 2nd day of April, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR