



Ondieki v Zaira Tours & Travel Limited & another (Civil Appeal E144 of 2024) [2025] KEHC 7548 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E144 OF 2024
BM MUSYOKI, J
MAY 30, 2025**

BETWEEN

JAMES ANGARE ONDIEKI APPELLANT

AND

ZAIRA TOURS & TRAVEL LIMITED 1ST RESPONDENT

RASHID HUSSEIN 2ND RESPONDENT

(Being an appeal against part of judgment and decree of the Senior Principal Magistrate's Court at Nyando (J.M. Wekesa SPM) in civil case number E239 of 2021 dated 3rd July 2024)

JUDGMENT

1. The appellant's amended memorandum of appeal dated 2nd July 2024 raises the following grounds;
 1. That the trial Magistrate erred in law and fact in awarding the plaintiff general damages of Kshs. 150,000/= for pain and suffering.
 2. That the trial Magistrate erred in her analysis of the evidence and facts on record and consequently arrived at an erroneous decision on the extent of the injury suffered by the Appellant.
 3. That trial Magistrate erred in law and fact by her refusal to award the Appellant the claim for future medical expenses.
 4. That learned trial Magistrate erred in law in his finding by failing to properly analyze the exhibits produced before her, the evidence presented before her and the Plaintiff's submissions and thereby arriving at the wrong judgment quantum.
2. The matter emanated from an accident that occurred on 12-11-2021 involving motor vehicle registration number KCG 648U which was owned by the 1st respondent and driven by the 2nd



respondent in which the appellant was said to have sustained injuries. After the trial, the Honourable Magistrate entered judgement for the appellant as against the respondent on liability at 100% and awarded Kshs 150,000.00 for pain and suffering, Kshs 9,050.00 for special damages, costs of the suit and interest but declined to award any sum for future medical expences.

3. The appeal was disposed of by way of written submissions. Having read the submissions of the parties and flowing from the above grounds of appeal, it is clear to me that the appeal is on quantum only. The appellant's complaint about the judgement of the trial court is that the general damages awarded for pain and suffering was too low compared to the trend of awards in respect of similar injuries and as such it amounted wrong estimate.
4. What flows from the submissions of the parties is that they differ on two issues. These are; the extent of the injuries sustained by the appellant and whether the appellant was entitled to an award of damages for future medical expences. Based on the this, all that this court needs to evaluate is whether the injuries as pleaded were actually proved. The appellant pleaded that he sustained the following injuries;
 - a. Head injuries involving swelling and multiple cut wounds on the head and tenderness on the neck.
 - b. Tenderness on the right chest
 - c. Fracture of 2nd right rib.
 - d. Clavicular joint dislocation.
 - e. Bruises on the shoulder joints.
 - f. Bruises on the elbow joints.
 - g. Swollen and bruises on the knee joints.
5. The point of departure of the parties is the fracture to the ribs which the court found had not been proved. The trial court held that the appellant did not produce X-ray films to prove the fracture and on that issue the appellant submits that the court was not competent to read the X-ray films. According to the appellant, all that was need was evidence of the doctors who treated the appellant and prepared medical reports.
6. I am in agreement with the appellant that the court did not have the expertise of reading or interpreting the X-ray films if they were to be produced. Injuries are proved by way of oral evidence corroborated by medical records. In my judgement, an X-ray report would be sufficient to prove any fractures and the court must rely on the medical documents produced by the parties. Actually, that is why in matters of personal injuries, the defendant is normally entitled to subject the plaintiff to a re-examination by their own doctor to forestall any attempt to mislead the court on the nature and extent of injuries.
7. However, the above does not mean that a court must accept medical documents or expert evidence unconditionally and without a duty to examine and evaluate the same. The court has a duty to evaluate and examine the evidence produced by experts and ascertain whether they are in support of pleaded facts. That is why the burden of proof is placed on the party seeking to rely on an expert report.
8. In order to establish whether the medical records are in support of the pleaded facts, this court must evaluate and analyse the reports and evidence of the different witnesses who spoke to the issue of the extent of the injuries. The plaintiff called four witnesses who testified on the issue.
9. The plaintiff adopted his statement dated 3-12-2021 in which he stated that he was treated on the same date of accident and although he did not state whether he was admitted, the discharge summary



- he produced showed that he was discharged from Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) on 13-11-2021. He stated that he sustained injuries as pleaded in his plaint. He alleged in cross examination that he still attended clinic at Nyamira hospital but had no documents in proof of the same.
10. Another witness who testified on injuries was Vincent Ooko from JOOTRH. He produced a discharge summary on the appellant dated 13-11-2021. He told the court that the hospital did a CT scan, chest x-ray and assessed trauma and added that all tests were normal. The appellant was reviewed on 28-02-2023 and was found to be fine. In cross examination, the witness stated that the injuries sustained were on the face and scalp and repeated that the X-ray and CT scan were normal. He actually stated that the patient did not sustain any fractures and that injuries sustained were soft tissue. He also added that the patient did not need to have further examinations.
 11. George Mwita working at Ahero County hospital testified that he examined the appellant and found that he had sustained multiple cut wounds and bruises on the head, neck pains, pain on the left chests, bruises on the elbows, shoulder and bruises on both knee joint. He also added that the appellant had a fracture of the 2nd right rib. He produced the P3 form he filled on 29-11-2021. On cross examination, he stated that he did not treat the patient who came to him nine days after the accident. He also said that the patient was not carrying the X-ray reports and according to him, he did physical examination and saw that the rib was protruding. He claimed that he could see a fracture without x-rays films or reports because he was a general orthopedic and what he saw were signs of fracture.
 12. The plaintiff also called a physician and a cardiologist known as William Okombo. This witness told the court that he examined the appellant on 14-12-2021 one month after the accident. He said that the appellant sustained head injuries, shoulder injuries, neck, chest, fractured two ribs, left shoulder injuries, left elbow and left knee and at the time of examination, he had not fully recovered. He claimed that the x-ray presented to him showed fracture of two ribs on the right side. He also recommended that the appellant continues getting treatment, physiotherapy, analgesics and orthopedic.
 13. The doctor admitted in cross-examination that he did not treat the patient when the injuries were fresh. He added that he relied on treatment notes from JOOTRH. He claimed to have checked x-ray report dated 16-11-2019 from image clinic although he stated that the doctor who initially tested the appellant was not lying. He added that the appellant needed future medication which would costs approximately Kshs 400,000.00. He ended by putting the appellant's disability due to the injuries at 20 per cent.
 14. The initial treatment and diagnosis in matters of injury is integral and central in proving not only the nature and extent of the injuries but also the possible causation. The appellant was treated only in one facility that is JOOTRH. He never went for follow up in any other hospital as much as the medical record produced in court show. The documents from this hospital must inform the diagnosis or observation or opinion of any other medical doctor or attendant.
 15. I have carefully gone through the discharge summary produced as exhibit 1. The discharge summary shows that x-ray was taken at the hospital and the results of the same showed that the appellant was normal which obviously means that the appellant did not have fractures. There is no indication that the appellant checked into the hospital with a fracture of the ribs.
 16. The appellant has argued that once medical doctors say that the appellant had a fracture, the court had no business in holding otherwise. It is true that doctors are the experts in ascertaining the injuries but the court cannot turn a blind eye and take every word a witness comes with. In this case, there are varied opinions on the nature of injuries the appellant suffered and the court as the arbiter must take the one which is more reasonable or probable than the other. The evidence of an expert is not binding on the



court and where it is successfully challenged or falls short of the truth, the court must disregard it. The court has the powers to reject an expert opinion or evidence even where there is no evidence tendered to the contrary if it appears untenable and lacking basis. In *Kagina v Kagina & 2 others* (2021) KECA 242 (KLR), the Court of Appeal held that;

‘Bearing the above caution in mind, our position is that upon our perusal of the expert report tendered in evidence by the expert the appellant called to testify on his behalf, the oral testimony tendered by the expert witness and his responses to questions put to him on cross-examination, in light of the totality of the record as appraised by the trial court in the first instance and now this Court on appeal, our position is that we wholly agree with the learned Judge’s decision as to why the Judge discounted the said expert’s evidence even though there was no contrary expert opinion to controvert it. Our reasons for reaching the above conclusion are as follows: firstly, the expert opinion evidence was not binding on the Judge, neither does it bind this Court. Second, it had failed the test of qualification as an expert report for the witness’s failure to adduce evidence on his credentials.’

17. And in *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* (2006) KECA 130 (KLR) the Court of Appeal reiterated that an expert’s opinion is subject to court’s scrutiny and evaluation by holding that;

‘Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions. We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. In *Ndolo v Ndolo* [1995] LLR 390 (CAK), this Court stated: -

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: “Because this is the evidence of an expert, I believe it”.’

18. The evidence of the two witnesses who spoke of fracture of the ribs had glaring gaps which the Magistrate was justified in questioning. The clinical officer who filled the P3 form admitted that he did not see any x-rays but he could tell that the appellant had a fracture by physical observation. He was not the one who tested the appellant. Only an ignorant or uninformed person would believe that narrative. The witness wanted the court to believe that he had eyes which could penetrate the muscles and see a fracture by just observing the appellant. Of course, a medic would suspect a fracture by physical examination but that can only be ascertained by further examination with machines or special tools made for that purpose. This was done by the doctors in JOOTRH when they received the appellant for treatment and the results were negative.
19. The doctor who came up with a medical report and alleged to have had seen x-rays films from an imaging clinic alleged that the appellant fractured two ribs on the right side. He also alleged that the appellant had not fully recovered and needed further treatment. This is in contrast to the discharge summary from JOOTRH and oral evidence of Vincent Ooko who produced the documents from the said hospital. There was no proof that the appellant went for any further treatment. With these



pertinent contradictions, the court cannot take the expert evidence at its face value as it has a duty to make distinctions and ascertain which version is more believable.

20. The discharge summary had initial diagnosis as mild head injury due to road traffic accident. The final diagnosis in the same discharge summary also showed the same. Obviously, a final diagnosis is given after investigations are ordered and completed. The court should be interested to know why Doctor Okombi preferred to rely on the alleged report from the undisclosed image clinic if at all it existed. A prudent doctor would in circumstances like these order for his own x-ray to ascertain the level of the healing process of the fracture especially that there was no diagnosis of a fracture from the initial and the only hospital the appellant attended. In these circumstances, the Magistrate was right to hold that the absence of x-ray films was material. In my view, if indeed the appellant sustained fracture of the ribs, then the same was not caused by the accident. It must have come later after he was discharged from JOOTRH.
21. I turn to the claim for future medical expenses which was claimed to be Kshs 400,000.00. In my view, there must be a basis for such claims. The appellant's claim was based on the medical report produced by his doctor. I have already cast doubts on the truthfulness of the said medical report. It does not state what would be the nature of the future treatment the appellant would have to undergo. If it was related to the alleged fracture of the ribs, then it must fall on the wayside this court having found that there was no proof of the fractures.
22. The witness from JOOTRH stated that the appellant had healed and did not require more examination. The nature of injuries sustained do not call for such future medical attention. Both the doctor and the clinical officer agree that the treatment given was prescription of analgesics and painkillers. There were no surgeries. On this background, I agree with the Honourable Magistrate that the claim for future medial expenses was not proved.
23. The upshot of the above is that the appeal herein lacks merits and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Judgment delivered in presence of Miss Miyeso for the respondent and in absence of the appellant.

