Manyarah v Kabutura (Civil Appeal E168 of 2022)
[2025] KEHC 11522 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11522 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E168 OF 2022

HM NYAGA, J

JULY 29, 2025

BETWEEN

SOLOMON MURITHI MANYARAH ..... APPELLANT

AND

GLORIA NKATHA KABUTURA ..... RESPONDENT

(Being an appeal from the Judgment/decree of Honourable M.A Odhiambo (SRM) delivered 25th November,2022 in Meru CMCC No.154 of 2018)

JUDGMENT

1. This is an appeal from the Judgment in the Meru Chief Magistrate's court civil case No. 154 of 2018 delivered on 25th November,2022 in the following terms:

   a. Liability 75 % against defendant

   b. General Damages Ksh.800,000/=

   c. Special Damages Ksh. 17,800/=
   Total Ksh. 817,800/= (Less 25%)

   Net award- Ksh. 613,350/=

   d. Costs of the suit & interest to the plaintiff.

   e. Interests at court rates.

2. The claim arose as a result of a road traffic accident that occurred on or around 31.3.2016 along Meru-Isiolo Road. As per the plaint, the Respondent averred that on the said date he was lawfully travelling in Respondent's Motor Vehicle Registration No. KBV 548U when the Appellant's driver, servant or agent negligently drove the said motor vehicle that he caused it to lose control and collide with motor cycle registration number KMDJ 071D thereby occasioning him serious bodily injuries.

3. At the conclusion of the matter, the trial court rendered its decision on 25th November,2022 in the aforementioned terms. These awards in damages are the subject of this appeal.

4. Through a Memorandum of Appeal dated 15th December, 2022, the Appellant has raised the following grounds: -

    a. The Learned trial Magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the Respondent.

    b. The Learned trial Magistrate erred in fact and in law by ignoring the Defendant's written submissions and authorities cited therein in assessing general damages for pain, suffering and loss of amenities.

5. The appellant urged the court to allow this appeal with costs and set aside the judgment of the trial court.

6. The appeal was canvassed by way of written submissions. The Appellants submissions are dated 30th April,2024 while the Respondent's submissions are dated 21st May,2024.

Appellant's Submissions

7. The Appellant submitted that the Respondent's alleged injuries were not proved through documentary evidence as the same were not produced. It was his position that the consent letter neither provided for production of documents nor how the assessment was to be done, and as such the best the trial court would have done under the circumstances was to award the nominal damages only.

8. Regarding general damages awarded by the trial court, the Appellant submitted that the same is manifestly excessive and premised on wrong principles. He submitted that the case of Man power Networks Limited Vs Ezekiel Mwalukuku[2020] eKLR relied on by the lower court in making the aforesaid award is distinguishable as the injuries sustained by the Respondent therein were severe compared to the injuries sustained by the Respondent herein.

9. He thus urged this court to dismiss the Respondent's claim for want of proof.

10. He further submitted that had the Respondent proved his injuries, an award of Ksh. 250,000/= would suffice as general damages.

Respondent's Submissions

11. On the consent letter, the Respondent submitted that the terms therein were clear and unambiguous and that she believed that having recorded the consent each party was at liberty to rely on the documents filed without the same being formally produced in evidence in support of quantum.

12. The Respondent argued that the Appellant's failure to object amounted to acceptance of the documents' admissibility and a waiver of the cross-examination rights.

13. She asserted that the Appellant was malicious as he raised the issue of non-production of documents in their submissions which he failed to serve her so that she could respond to the same.

14. Citing Article 159(2) (d) of *the Constitution*, the respondent submitted that it would be affront and travesty of justice if her case was dismissed as the documents attached to her pleadings show that she indeed suffered injuries and loss as a result of the accident.

15. The Respondent submitted that she provided all documents to her advocate and the failure to produce them was her counsel's mistake, which should not be visited upon her.

16. She prayed that this matter be remitted back to the trial court for hearing and determination noting that there was no trial as required under the law. In support of this position, she placed reliance on Order 18 Rule 2 of the Civil Procedure Rules and the cases of Mumias Agricultural Transport vs. Sony Agricultural Ltd. Civil Appeal No. 201 of 1997, Robert Ngande Kathathi V Francis Kivuva Kitonde (2020) eKLR & Peter Simiyu v National Industrial Credit Bank & another [2020] eKLR

Analysis & determination

17. This being the first appeal, the court will re-evaluate the evidence and come to its own conclusions and findings except it should be minded that it neither heard nor saw the witnesses when they testified. See the case of See Selle Vs. Associated Motor Boat Company (1968) EA 123.

18. I have considered the pleadings, consent in issue and submissions of the parties in this appeal and I am of the considered view that the main issue that this court should determine is whether or not to remit the matter back to the lower court for hearing and determination.

19. It is not in dispute that the parties recorded a consent on liability on 20th September 2022 and thereafter filed submissions on quantum which the trial court considered before delivering its judgment on 25th November 2022.

20. The said consent was in the following terms

> " By consent the judgement on liability be and is hereby entered at the ratio of 75:25% in favour of the Plaintiff against the Defendant.
>
> Parties to file written submissions addressing quantum of damages to enable the court assess the same.
>
> Matter be mentioned on 18th October,2022 to confirm filing of Submissions."

21. The aforesaid consent was duly adopted as an order of the court.

22. It is not in contention that the documents relied upon by the Respondent were not formally tendered in evidence during the trial. Although the documents were on record, they did not form part of the judicial record as they were not produced and admitted by the court as exhibits. Additionally, the consent recorded by the parties made no reference to the production of the Plaintiff's documents as exhibits.

23. In Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR, where documents had been referred to by a witness and marked for identification but were never produced as exhibits, the Court of Appeal stated thus:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document

> in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case.When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

24. The above position is binding on this court and on the trial court. It is therefore patent that a party wishing the court to admit their documents as exhibits has a duty to say so in clear terms and not for the court to assume the production of the documents as was the case here. Accordingly, the trial court fell into error by presuming that the filed documents were deemed produced as exhibits and by relying on them in determining the matter.

25. The Respondent has submitted that no hearing took place as contemplated by the law considering the sudden change of mind by the Appellant with regard to production of documents by consent. She has relied on Order 18 Rule 2 of the Civil Procedure Rules in support thereof.

26. The said Section is on the mode of hearing in civil suits. It provides as follows: -

    1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

    2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case.

    3. The party beginning may then reply.

27. The use of the words "Unless the court otherwise Orders..." at Order 18 Rule 2 above gives the Court the discretion to deviate from that prescribed mode of hearing. However, the said rule requires that there must be an order issued by the Court if that is to happen. This is what gives Courts authority to order that a matter be canvassed by way of written submissions instead of proceeding orally in the manner outlined above. The consent outlining the manner in which the issue of quantum was to be addressed was unequivocal. The parties expressly elected to proceed by way of written submissions, a position that was adopted as an order of the court. It goes without saying therefore that the trial court deviated from the above mode of hearing by adopting the party's agreed mode of hearing.

28. However, in my opinion, the trial court fell into error by failing to call for the production of documents before proceeding to determine the matter. This error was fatal and it rendered the entire trial a nullity.

29. I have perused the authorities cited by the Respondent in this issue. In Robert Ngande Kathathi v Francis Kivuva Kitonde (supra) the case involved facts materially similar to those before this Court. The court held that there was no trial as contemplated by law and remitted the matter back to the lower court for hearing and determination. The court stated as follows: -

> In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced, they do not acquire the status of exhibits in the case.....

Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect is to amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court's process or exposes the adjudicatory process to ridicule ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In my view whereas in adversarial systems like ours parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced...

The current trend is that the Court must always be on the driving seat of litigation and this was appreciated by the Court of Appeal in Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, where the it was held inter alia that:

"On 23rd July 2009 both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

30. In Peter Simiyu v National Industrial Credit Bank & another (supra) the parties recorded a consent on liability and agreed to address the issue of quantum through written submissions. They did not, however, consent to the production of documents as exhibits. Nevertheless, the trial court relied on the plaint, witness statement, and documents filed therewith in its judgment. On appeal, High Court held that there was no trial as envisaged by law and consequently remitted the matter to the lower court for hearing and determination on the issue of quantum.

31. In Socfinaf Company Limited v Peter Mbugua Njoki [2020] eKLR, the court held as follows: -

> " It is clear that whichever way one looks at it, it is a requirement that evidence be produced in support of the issues in contention whether at the hearing or by consent. The decision of the trial court to not conduct a hearing or call for the production of evidence and instead order the parties to canvass the issue of quantum by way of written submissions was a fatal error and rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law."

32. In Mumias Agricultural Transport vs. Sony Agricultural Ltd. (supra), the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing.

33. In view of the foregoing, I opine that the determination by the lower court on the issue quantum was void ab initio. There was no trial as envisaged under the law and guided by the above cited Court of Appeal case, I direct as follows: -

    a. The matter be remitted back to the lower court for hearing and determination in accordance with the law.

    b. The consent on liability shall remain undisturbed.

    c. Each party shall bear its own costs.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF JULY, 2025.

H. M. NYAGA,

JUDGE.