Case Number:	Civil Appeal 16 of 2014
Date Delivered:	21 Dec 2018
Case Class:	Civil
Court:	High Court at Machakos
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Kariuki Lydia & another v A M [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Machakos
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 16 OF 2014

KARIUKI LYDIA.....1ST APPELANT

KIM LOGYSTICS.....2ND APPELLANT

=VERSUS=

A M.....RESPONDENT

(*Being an Appeal from the Judgment delivered by the Honourable M.K. Mwangi, SPM*

in Machakos CMCC No. 485 of 2012 on 24th January, 2014)

=IN=

AM (A minor suing through his mother and next friend JMM).....PLAINTIFF

=VERSUS=

KARIUKI LYDIA.....1ST DEFENDANT

KIM LOGYSTICS.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 7th June, 2012, the Respondent herein instituted a suit against the Appellants herein claiming General Damages for pain, suffering and loss of amenities, Special Damages in the sum of Kshs 2,100/-, Costs and interests.

2. The Respondent's suit was premised on the fact that on or about the 7th April, 2012, the Respondent, minor, was travelling in motor vehicle registration number KAQ 649K, legally owned by the 1st Appellant and beneficially owned by the 2nd Appellant along Machakos-Wote road when at Mwania Bridge, the said defendants' driver negligently caused the said vehicle to lose control, veer off and overturn as a result of which the plaintiff sustained severe injuries. Both the particulars of negligence and injuries were set out in the plaint.

3. The Respondent also relied on *res ipsa loquitor*.

4. PW1 was **Dr. John Mutunga** of Machakos level 5 Hospital who was called to produce the P3 form which he prepared 6 months after the accident. According to him the plaintiff, a minor aged 7½, was injured in a road traffic accident in which he sustained blunt

chest injury, blunt injury to the left hand, bruise on the left hand, blunt injury left knee, blunt injury right knee and bruises to both knees. To him the plaintiff suffered soft tissue injuries.

5. According to PW1, the Respondent was treated on pain killers and his injuries classified as harm. The witness also prepared a medical legal report for the plaintiff, and testified that the plaintiff still complained of chest pains and pain on the right knee. In the course of the preparation of the report, the witness stated that he relied on notes from Kenyatta National Hospital.

6. PW2, **Cpl Christine Nyaga**, attached to Machakos Police Base, received a report of a road accident on 7th April, 2012 involving motor vehicle Reg. No. KAQ 649K. According to her, the accident occurred when one **Sammy Kimeu** was driving the said vehicle hit a pothole at a great speed, lost control of the vehicle and landed in a ditch. The witness confirmed that one of the passengers who were injured was the plaintiff and that he was issued with a p3 form and police abstract which were exhibited.

7. The witness however confirmed that the driver of the said vehicle was not charged as the investigating office recommended the closure of the file.

8. PW3, **JMM**, was the mother of the plaintiff. According to her, on 7th April, 2010, she was traveling in the said vehicle and after Katoloni towards Wote direction but before Mwega Bridge, the vehicle which was over speeding, lost control, veered off the road and landed into a ditch. According to her the road had potholes and was under repairs at the time of the accident. In her view the driver of the vehicle was to blame for speeding and for the accident.

9. PW3 testified that the plaintiff was injured on the chest, left hand and both knees. She accordingly took her to Kenyatta National Hospital where he was treated and discharged. In her evidence, the reason she took the plaintiff to Kenyatta Hospital instead of other available hospitals was because she was staying in Nairobi. She however testified that the plaintiff had healed.

10. The PW3 also carried out a search of the offices of the registrar of motor vehicles and exhibited a report therefrom. She testified that she spent Kshs 1,600/= for the treatment of the plaintiff.

11. According to the witness, she was seated on the front seat and she checked the speedometer and saw that the driver was over speeding. In her view, despite the fact that the road had potholes, had the driver slowed down the accident would not have occurred.

12. On behalf of the defendants the called **Shaban N Mohammed**, a records officer at Kenyatta National Hospital. The witness she authentication stating that the medical notes were not authentic in respect of the reference number. The witness also testified that from their records, complaint number 1427644 belonged to one **Lita Nzioki**, who was aged 83 years and not the plaintiff herein.

13. The witness however did not have a register of the Hospital's patients. He testified that he was not the one who registered patients and did not know who issued the plaintiff the said number. He however admitted that the treatment card had a letterhead from Kenyatta Hospital and could not tell who issued the wrong number. Referred to the treatment card issued to the plaintiff's mother, he stated that he could not state whether it was genuine and whether or not the plaintiff was treated at the Hospital.

14. In his judgement, the Learned Trial Magistrate found that the driver of motor vehicle Reg. No. KAQ 649K was negligent by driving at a speed which was excessive in the circumstances. He therefore proceeded to find the Defendant 100% liable for the accident.

15. As regards the quantum, the trial court awarded the plaintiff Kshs 120,000/= as general damages and Kshs 2,000/= being special damages, plus costs of the suit.

16. The appellants now appeal to this court on the following grounds:

1) The learned magistrate misdirected himself on the assessment of quantum on general damages.

2) The learned trial magistrate erred in law and in fact in his award of general damages at Kshs. 120,000/= without any evidence and/or explanation how it was arrived at in his judgment and which amount or figure was not at all relied on in

evidence and/or proved at trial by the plaintiff's side.

3) The learned magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration to the evidence adduced by DW1 that the treatment notes did not originate from Kenyatta National Hospital and that outpatient number indicated on the treatment notes did not belong to the minor plaintiff.

4) The learned magistrate erred in law and in finding that the plaintiff has proven that the minor suffered injuries as a result of the subject accident which occurred on 7-4-2012 when evidence adduced proved that the treatment notes are fraudulent.

5) The learned magistrate erred in law and in fact by relying on the evidence of PW2 and PW3 who are not expert witnesses as prove that the claimant sustained injuries as a result of the accident.

6) The learned trial magistrate erred in law and fact in awarding Kshs. 120,000/= as general damages which amount was contrary to conventional awards in similar and/or related cases by superior court(s) of law.

7) The learned magistrate erred in fact and in law in failing to totally consider the defendants' submissions on liability.

8) The learned magistrate erred in fact and in law by failing to consider conventional awards on general damages in similar and/or related cases by superior court(s) of Law.

9) The learned magistrate erred in fact and in law in making an award for a special damages that had not been strictly proved at trial.

17. It was submitted on behalf of the appellants based on the evidence on the record that PW1 in preparing his report relied on initial treatment records which were later on confirmed as fraudulent. It was therefore submitted that in making an award the Learned Trial Magistrate left out a relevant matter. In urging the Court to find that the treatment record the plaintiff relied on did not belong to the plaintiff, the appellants relied on **Timsales Ltd vs. Wilson Libuywa [2008] eKLR** and submitted that in an accident claim, the injuries sustained must be proved by the treatment notes at the first point of examination. It was submitted that in this case no injuries were indicated in the treatment notes and without treatment notes, the Respondent did not prove that he was injured on the day and place he claims it to have occurred. The Court was therefore urged to re-evaluate the evidence on fraud.

18. On quantum, it was submitted that the Respondent failed to prove his on a balance of probabilities. In this case, it was submitted that the plaintiff suffered soft tissue injuries and the court was urged to base its decisions on **Samwel Mburu N Ng'aari & Others vs. Wangiki Wangare & Another [2014] eKLR** and **George Mugo & Another vs. A K M [2018] eKLR** where awards of Kshs 50,000.00 and Kshs 90,000.00 were awarded for soft tissue injuries.

19. However it was the appellant's case that the Court allows this appeal in its entirety and sets aside the judgement delivered by the Court below.

20. On behalf of the Respondent, it was submitted that the evidence on liability is to be found in the evidence of P2 and PW3 with PW2 testifying that the vehicle lost control after the driver hit a pothole and landed in a ditch. The same testimony was given by PW3. Since the driver of the vehicle did not testify, it was submitted that the respondent's evidence on liability remained uncontroverted hence the findings on liability cannot be faulted.

21. As regards the authenticity of the plaintiff's medical records, it was submitted that the plaintiff cannot be held liable for a process he had no control over and that if the wrong outpatient number was indicated, then it was the mistake of the records officer. According to the Respondent, a treatment card cannot be revoked merely because of a wrong outpatient number. It was submitted that the injuries sustained by the plaintiff were proved by the P3 form and the medical report prepared by PW1 hence the injuries sustained were well proved by documentary evidence.

22. As regards the award, it was submitted that the plaintiff sustained soft tissue injuries which attract awards of between Kshs

100,000/= and Kshs 200,000/=. To the Respondent, there was no misdirection on the part of the trial court in assessing general damages of Kshs 120,000/= as well as Kshs 2,100/= special damages. In this respect the Respondent relied on **Quentine Wambua vs. Ndinda Wambua Kituu Machakos HCCA No. 19 of 2008** where an award of Kshs 150,000.00.

Determinations

23. I have considered the submissions of the parties in this appeal. Order 21 rules 4 and 5 of the ***Civil Procedure Rules*** provides as follows:

4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.

24. In this case one of the issues that arose from the evidence was whether the medical document relied upon by the Respondent was a genuine document. The Court completely failed to deal with this issue. The failure to do so can be traced to the fact that the Trial Court did not frame the issues for determination. The importance of the need to frame issues for determination was emphasised in **Rukidi vs. Iguru and Another [1995-1998] 2 EA 318** where it was held that:

"Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus-oriented and saves the time of the Court and there is nothing wrong with the parties or their counsel agreeing on the issues or otherwise participating in their framing. The fact that issues were framed at the commencement of the hearing does not mean that they cannot be amended by addition or deletion since rule 5 Order 13 allows the Court, any time before passing the judgement, to amend the matters in controversy between the parties, or to strike out any issues that appear to have been wrongly framed. A trial Judge therefore always has a discretion to amend the issues framed any time before passing judgement but the point to be emphasised is the need to frame the issues at the commencement of the hearing of any suit to guide the parties and the Court in addressing the basic issues in controversy."

25. **Sergon, J**, however in **Ngugi Peter Ngumi Gichoho Alias Peter Ngumi Gichoho Ngugi vs. Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri HCCA No. 138 of 2003** noted that:

"A perusal of the record shows that the learned Principal Magistrate did not frame up the issues for determination which he was enjoined to do under Order 22 rule 5 of the Civil Procedure Rules. But the deficiency in failing to evaluate the evidence can be corrected by the first appellate court. Though the learned Principal Magistrate did not frame up the issues, he nevertheless ably analysed the evidence presented before him."

26. **Koome, J** (as she then was) similarly was of the view in **Sher Agencies Ltd vs. Felix Musumba Nakuru HCCA No. 7 of 2006** that the failure by the trial court to state the concise statement of the case and identify the issues for determination should be taken care in the first appeal.

27. Therefore, this being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. It was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

29. In other words since the Court on a first appeal has the power of the re-evaluation of the evidence presented before the Court below, the failure by that Court to adhere to the provisions of Order 21 rules 4 and 5 aforesaid is not necessarily fatal to a judgement casually prepared.

30. However in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

31. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. In this appeal, two issues arise for determination. The first issue is whether the Respondent relied on a fraudulent document in proving that she was treated at Kenyatta National Hospital. However in cross examination, DW1 stated he was not the one who registered patients and did not know who issued the plaintiff the said number. He however admitted that the treatment card had a letterhead from Kenyatta Hospital and could not tell who issued the wrong number. Referred to the treatment card issued to the plaintiff's mother, he stated that he could not state whether it was genuine and whether or not the plaintiff was treated at the Hospital. In **Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1**

KLR 1168, it was held by the Court of Appeal that:

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned."

33. In this case, it is clear that DW1's evidence was simply that from the records in his possession, complaint number 1427644 belonged to one **Lita Nzioki**, who was aged 83 years and not the plaintiff herein. He could however not state positively which of the two documents was genuine as he was not the author of any of them. In the premises, I am not satisfied that the appellant proved that the medical document relied upon by the Respondent was the one that was not authentic.

34. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

35. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made"" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

36. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be

possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

37. In this case the appellant's case is that the Respondent ought to have been awarded an amount not exceeding Kshs 90,000/- as opposed to Kshs 120,000.00 that was awarded. In my view, the amount awarded by the trial court, even if more than what this court had awarded had it been the trial court, does not justify interference unless it is shown that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. I am no so satisfied.

38. In the premises this appeal fails and is dismissed with costs to the Respondent.

39. It is so ordered.

Read, signed and delivered in open Court at Machakos this 21st day of December, 2018.

G.V. ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey