Makami v Nanga (Civil Appeal E063 of 2021)
[2023] KEHC 813 (KLR) (18 January 2023) (Judgment)

Neutral citation: [2023] KEHC 813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E063 OF 2021

RE ABURILI, J

JANUARY 18, 2023

BETWEEN

DAVID KARIUKI MAKAMI ..... APPELLANT

AND

ANDREW NANGA ..... RESPONDENT

(An appeal from the judgement and decree of Hon S.O. Temu S.P.M in Nyando PMCC No. 213 of 2016 delivered on 20th May, 2021)

JUDGMENT

1. This appeal is directly related to HCCA E062 of 2021. The common denominator is the appellant and the cause of action which arises from a road traffic accident. The issues and grounds of appeal are the same in all material particulars.

2. In the suit before the trial court, the respondent herein Andrew Nanga sued the appellant David Kariuki Makami seeking for damages arising out of a road traffic accident in which the appellant's motor vehicle registration number KBK 627V Toyota Matatu in which the respondent was travelling in on December 24, 2015 along Ahero-Kisumu Road at Boya after the appellant's driver Gerald Ndegwa who was the second defendant allegedly negligently drove and or managed the said vehicle, causing it to lose control, veer off the road and overturn.

3. The particulars of negligence attributed to the appellant's driver Gerald Ndegwa who was the second defendant were pleaded in the plaint dated June 21, 2016 at paragraph 6.

4. Among the particulars of negligence are: driving the said motor vehicle at an excessive speed in the circumstances and driving without due care and attention. The plaintiff also pleaded the doctrine of res ipsa loquitur.

5. In his written witness statement, the plaintiff stated that the defendant's driver was over speeding and that he lost control of the motor vehicle which overturned as a result of which he sustained injuries on the head, chest, back, left and right elbow and on both knees.

6. The defendants who were the appellant herein and another (defendants in the subordinate court) filed their defence denying the claim and or the occurrence of the accident and or in the manner pleaded by the plaintiff/respondent herein and attributed the occurrence of the accident to the plaintiff/ respondent's negligence.

7. Among the particulars of negligence attributed to the plaintiff/ respondent herein are that: he failed to take any adequate precautions for (her) own safety; he failed to heed safety precautions when travelling; failed to heed traffic rules and regulations when travelling; failed to apply/use a seat belt for (her) own safety; distracting the driver of the said motor vehicle by engaging him in endless banter and volenti non fit injuria. The defendants also denied that the plaintiff was injured as a result of the material accident or at all.

8. The trial court in its judgment which is impugned found the appellant 100% liable for the accident and awarded the respondent Kshs 100,000/- general damages thus the instant appeal which is anchored on the following grounds:

    i. The learned magistrate erred in law and fact in awarding an excessive amount n quantum to the plaintiff.

    ii. The learned magistrate erred in law and fact in awarding the plaintiff an excessive amount in damages yet the claim was fraudulent.

    iii. The learned trial magistrate erred in law and fact in holding that the defendant was wholly liable for the occurrence of the accident.

9. The appeal was canvassed by way of written submissions. Both parties complied.

10. On the issue of liability, the appellant submitted that there was no evidence adduced demonstrating negligence on the appellant's part and or his driver. That no investigation report was produced. In support of this contention, counsel for the appellant cited the case of *Benter Atieno Obonyo v Anne Nganga & another* [2021]eKLR.

11. On the issue of treatment notes availed, it was submitted on behalf of the appellant that the treatment notes and P3 form produced as allegedly emanating from Ahero District Hospital were not genuine. In addition, it was submitted that even then, the maker of the P3 form was not called to testify.

12. Further submission was that the initial treatment notes having been disowned by the facility is sufficient to warrant the setting aside of the trial court's judgement. On this issue, the following authorities were relied on:- *Entertainer Trucks Company Ltd v George Karanja Maina* [2020]eKLR, *Sospeter Kimutai & another v Isaac Kipleting Boit* [2014]eKLR, *John Mwendwa Kuti & 2 others Ibrahim Kunyaga* [2020]eKLR and *Hannah Waithira Mungai v Stephen Muiruri Njau & another*[(2016]eKLR.

13. On quantum, it was submitted that since the treatment notes relied on were revoked, the claim should be rendered fraudulent but that in any the event that the claim is found to have been genuine, an award of Kshs 50,000/- would be sufficient.

14. On the parameters to be considered while assessing damages, the cases of *Denshire Muteti Wambua v Kenya Power & Lighting Co. ltd* [2013] eKLR and *Kigaraari v Aya* [1982-88] 1KAR 768 were cited.

15. Finally, the appellant urged this court to set aside the trial court's judgement and allow the appeal with costs.

16. On behalf of the respondent, it was submitted on the issue of liability that his case was proved on a balance of probabilities through the production of a police abstract and the P3 form. That the fact that the vehicle rolled means that the same was being driven at a high speed. In this regard, the case of *Embu Public Road Services Ltd v Riimi* [1968] EA 22 and *Nandwa v Kenya Kazi Ltd* [1988]KLR 488 were relied on.

17. On the issue of treatment notes, it was submitted that PW-2 Dr.Nichodemus Mbuge was the maker of the document. That DW-1 who disowned the notes was not working at the facility at the time of treatment

18. On quantum, it was submitted that the injuries sustained by the respondent was corroborated by the treatment notes and the P3 form. That according to the authorities in *Boniface Waiti & another v Michael Kariuki Kamau and Ogembo Tea Factory Co. Ltd v Josephat Orange* [2017] eKLR, an award of 100,000/- was fair and reasonable.

Analysis and determination

19. As this is a first appeal, the role of this court is as set out in section 78 of the *Civil procedure Act* and interpreted in the age-old case of *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA 123 where it was held that:

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally."

20. Revisiting the evidence adduced before the trial court, Andrew Nanga Odhiambo, the respondent in this appeal testified as PW-1 and recalled that he was a fare paying passenger in the appellant's motor vehicle registration number KBK 627 V on 24/12/2015 at 9.50 am heading to Ahero and that when they reached Boya area, the vehicle lost control and rolled to the left side facing Awasi. That he was seated on the end of the left side. He was hit by a metal bar on the head, chest, bruised on both knees and went to Ahero District Hospital where he was treated and discharged on the same day. He blamed the accident on the driver who was over speeding and making the vehicle lose control.

21. In cross examination, he stated that he had no receipt but that the police are the ones who took him to hospital. He stated that the treatment notes had no letter head and were not signed and that the doctor's name was not on it. That he did not know how to read and write. He stated that he was with Walter Aduor Obongo. He also stated that he could see OP No. written and cancelled. Asked by the court on the defendant's letter dated 26/8/2016, he maintained that he was treated at Ahero District Hospital. He stated that he did not know the name of the doctor.

22. In reexamination, he maintained that he was treated at Ahero ands that the treatment notes have a rubber stamp of Ahero District Hospital. He stated that the canellation of OP number was done by a doctor.

23. PW-2 Nichodemus Mbuge testified that he was a Registered Clinical officer at officer at Ahero District Hospital. He testified that on December 24, 2015 he worked at Ahero District Hospital and that he treated the respondent of OP number 21242/15 and noted the following injuries: marked swelling on the occipital area of the head with neck pain, marked chest pain and cut wound on the left elbow joint and bruises on the left knee. He classified the injuries as soft tissue injuries. He also produced a P3 form for the respondent as an exhibit 2 as filled by Dr. Mwita with whom they worked for one year.

24. In cross examination, he stated that the P3 had no Reference number and that he worked at Ahero. By consent, the police abstract was produced as exhibit PEXb 3.

25. PW-3 Prof. Were Okombo a physician examined the respondent on 2/6/2016 reiterating the injuries stated by PW-2. He also classified the injuries as soft tissue. He stated that as at the time of such examination, the respondent had not properly healed. He produced the medical report as an exhibit 4ba and a receipt as exhibit 4b. In cross examination, he stated that he used treatment notes from Ahero District Hosiptal.

26. On behalf of the appellant, DW1 whose name was not given by the court in the proceedings testified that the medical records allegedly issued from Ahero District Hospital did not originate from the facility. He produced a letter dated 26/2/2016 to that effect. He stated that the OP number given was never issued at their facility.

27. In cross examination, DW1 stated that he was not at the said hospital on December 24, 2015 and that the letter was written by Dr Collins. He stated that the letter does not state that the stamp on it is fake and neither does it say that the handwriting is not from the hospital. He stated that George Mwita works at the hospital facility.

28. I have reviewed the evidence adduced before the trial court, the grounds of appeal and the submissions by the parties herein, I find the issues of the authenticity of the claim, liability and quantum of damages are ripe for determination in this appeal.

29. The appellant faults the trial court for not finding that the claim was fictitious for the reason that the treating doctor is not known to the facility and that the doctor who filled the P3 form still works at the facility yet he was not called to testify. That the outpatient number allocated to the respondent did not exist in the hospital. In support of this, the appellant through DW-1 Dr Bernard Otieno produced a letter dated 26/8/2016 written by Dr Collins claiming that from their records, the treatment notes were not from the facility and that the author did not work at the facility and neither was the OP number belonging to the facility.

30. It is settled law that the burden of proof in civil cases is on a balance of probability. Nyakundi J in *Christine Kalama v Jane Wanja Njeru & another* [2021] eKLR citing with approval *Re H (minors) sexual abuse; standard of proof* [1996] AC 563 and 505 for the *Home Department v Rehman* [2003]1 AC 153 set down the guiding principles when establishing the standard as follows:

> "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.

(2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.

(3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the court will assume that some things are inherently more likely than others."

31. Considering that the appellant never raised any objection to the production of the treatment notes which were produced by the person who stated that he was the author, the police abstract having been produced by consent, and the P3 form having been produced without any objection requiring the maker thereof, I find refuge in the Court of Appeal's decision in *Wellington Nganga Muthiora v Akamba Public Road Services Limited & another* [2010] 2 KLR 39 where it was held that:

> " The appellant produced police abstract which stated that the first respondent was the owner of the vehicle and that was prima facie evidence. The first respondent did not challenge the production of the police abstract by the appellant on the basis either that he was not the maker of it or that the contents were not admissible or were not correct. The first respondent let it be produced without raising a finger. In cross-examination by the learned Counsel for the first respondent, the allegation in the police abstract that the first respondent was the owner was not challenged, though the other contents of the abstract such as whether indeed the appellant was a passenger in the same bus were challenged by clear questions as to whether the appellant's name was in the passenger manifest and whether he had a ticket as evidence that he was in the passenger bus. In such a situation where the police abstract's contents pertaining to ownership of the vehicle was not challenged, it remained prima facie evidence and when the respondents offered no evidence in their defence, such prima facie evidence was not rebutted and it remained valid, unrebutted evidence before the court."

32. The question is whether the trial magistrate erred in finding that the plaintiff was injured in view of the denial by the hospital that treatment notes originated from there and that the person who treated him never worked at the hospital. Further, is failure to produce ytreatment notes fatal to the plaintiff's claim?

33. In *Timsales Limited v Elijah Macharia*[2012]eKLR, the court observed that:

> " Even though the respondent presented and the court marked the treatment notes from Elburgon Hospital for identification, it was not produced as an exhibit. It was, as a result argued by the appellant that failure to produce the treatment notes was fatal to the respondent's case. Opinions of the effect of failure to produce treatment notes are diverse and varied. In Timsales Limited v Daniel Karanja Bise, Civil Appeal No. 111 of 2005, Nakuru, Emukule, J. observed that:
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> "Being a public document the production of it in evidence does not require certification by the health facility or the testimony of the health facility, as would ordinarily be required under section 82(d) (i) of the *Evidence Act*. ..... by excluding the respondent's attendance and treatment card, could I also say that there was no accident and injury to the respondent? To so conclude would render examination of the respondent by Dr. Kiamba and Dr. Malik an exercise in futility and consign their opinion to the waste paper bin. Their notes about the scar on the respondent's thigh 12cm in length would all evaporate and became a figment of imagination. That would be an absurd conclusion."[emphasis added]

34. Similarly, D. K Maraga, J. (as he then was) in *Comply Industries Limited v Mburu Simon Mburu*, Civil Appeal No.121 of 2005 observed that failure to produce a treatment card does not always lead to dismissal of injury claims. The learned Judge held that:

> "Where a doctor who examines him (complainant) several days or months later makes reference to the treatment card, unless otherwise proved, that would suffice and the production of the treatment card is not necessary. Failure to produce treatment cards is fatal only when the plaintiff fails to prove by other evidence that he was indeed injured and doubt is cast on his injury claim."

35. In the *Timsales v Elijah Case* (supra), the Court further observed as follows:

> "The trial court saw and even marked as MFI 1 the treatment notes that Dr. Kiamba relied on in preparing the medical report. The doctor also physically noted the injuries the respondent suffered represented at the time of examination by a scar. The appellant did not allege or prove that the treatment chit to have been a forgery. To dismiss, the respondent's claim on the basis of the failure to produce the treatment chit would, in my view, be against the spirit of Article 159(2) (d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*. (see the decision of this court in Gachagua Sawmills Limited v Ephram M. Omera, Civil Appeal No. 159 of 2005). My conclusion is that the respondent was injured in the course of his employment with the appellant."[emphasis added]

36. From the defence witness, there was no denial that the stamp on the treatment notes belonged to the hospital. In addition, the defence witness stated that he was not in hospital on the date when the plaintiff is said to have been treated there for injuries arising from an accident. Further, he never told the court when he started working at the said hospital and whether the hospital allowed medical personnel who were not necessarily employees of the hospital to attend to patients. In other words, the defendant did not rebut the evidence of the clinical officer who even said he was registered and that he attended to the plaintiff at the hospital.

37. Iam unable on the evidence adduced, to find that the hospital treatment notes were fraudulently obtained as no evidence of fraud was adduced. Further, that evidence of treatment notes and injuries sustained by the plaintiff must be looked at wholesomely with the question of whether or not the plaintiff was involved in the accident which was reported to the police and a police abstract produced as exhibit by consent. In addition, the P3 form issued by the police was filled at the Ahero Hospital and the author was admittedly still working at the said hospital. The defendant never challenged the evidence in the P3 form that revealed that the plaintiff sustained injuries as stated.

38. In Nairobi High Court Civil Case No. 4045 of 1988 *Kabugu Mutua v Kenya Bus Services*, Ringera J pronounced himself thus:

> "Although I am of the opinion that lack of medical evidence is not fatal to a claim for damages for personal injuries, it is nonetheless manifest that only such evidence can clarify and substantiate the nature and extent as well as the sequels of alleged injuries."

39. In this case, even in the absence of medical notes, the plaintiff produced a P3 form and a medical report which were never controverted to be genuinely obtained from the hospital and the doctor who examined him later prior to filing of the suit and the injuries were not different from those listed in the challenged treatment notes. I therefore find that the plaintiff proved on a balance of probabilities that

he was injured in the material accident and that he was treated for the said injuries. I further find that there was no evidence of fraud on the part of the respondent.

40. On liability, it is now settled law that there is no liability without fault. This was the holding in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 that:

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

41. Negligence is established once it is shown that the tort-feasor owed the wronged party a duty of care which is subsequently breached by the defendant. The ingredients can be discerned from the English authority of Caparo Industries PLC v Dickman (1990) 1 ALL ER 568 where it was stated that:

> " What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

42. The plaintiff pleaded and testified that he was a passenger in the appellant's motor vehicle at the time of the accident. He pleaded the particulars of negligence on the part of the driver and stated in evidence that the driver was over speeding that is when he lost control of the vehicle which overturned.

43. The appellant pleaded denying occurrence of the accident in the manner pleaded and or injuries sustained by the plaintiff and even attributed the occurrence of the accident to the plaintiff and outlined the particulars of negligence against him as a passenger. However, he never called the driver of the accident motor vehicle to rebut the testimony of the respondent that the driver was over speeding and lost control of the accident motor vehicle and rolled thereby injuring the respondent.

44. Although the appellant submitted that the investigating officer was never called to state who was to blame for the accident and or that there was no evidence that the appellant's driver was charged for any traffic offence, the police abstract produced by consent showed that the case was pending under investigations.

45. I am satisfied that in the absence of evidence in rebuttal from the appellant that the accident did not occur in the manner described by the respondent, the respondent proved on a balance of probabilities that the defendant's driver was liable for the accident.

46. It is the appellant's driver who was in control of the vehicle during the accident and who owed the respondent the duty of care to drive safely within permissible limits and being on the proper look out. The appellant adduced no evidence in rebuttal of this fact. There is nothing that the respondent could have done and or failed to do in the circumstances to avoid the accident and or mitigate the injuries sustained.

47. In the case of Edward Muuga v Nathaniel D. Schuller (C.A. No 23 of 1997 (UR), the Court of Appeal observed that where a defendant does not adduce evidence, the plaintiffs' evidence is to be believed. In this case, the appellant defendant did not adduce any evidence as to what precipitated or circumstances leading to the accident. That evidence was given by the respondent and it was never rebutted. It must

therefore be believed. See Makhandia J (as he then was) in *Jamal Ramadhan Yusuf & another v Ruth Achieng Onditi & another* [2010]e KLR.

48. From the evidence available, I am satisfied that the trial court's finding on liability was proper and accorded with the evidence tendered before the trial court.

49. On the quantum of damages awarded, the appellant submitted in support of his ground of appeal that since the claim by the respondent was fraudulent, there were no injuries sustained hence the respondent was not entitled to any damages and that should the court find that he was entitled to the damages, then an award of Kshs 50,000 would be sufficient.

50. I have already made a finding that the plaintiff's claim is not fraudulent.

51. The principles to be followed when assessing damages were discussed in the case of *Butler v Butler*, [1984] eKLR, wherein the Court of Appeal held that:

> "In awarding damages, a court should consider the general picture of all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts. 9. The fall in the value of money generally, and the leveling up and down of the rate of exchange between the currencies of Kenya and of the country from which comparable cases derived, must be taken into account. 10. The assessment of damages is more likely an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

52. Similar sentiments were echoed in *Ugenya Bus Service v Gachuki* [1981 – 1986] KLR 567 where it was observed that:

> "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision."

53. The evidence of PW-2 and PW-3 was categorical that the respondent sustained soft tissue injuries. In keeping with precedent so as to achieve uniformity, I have examined various decisions where the injuries complained of were soft tissue. In *Fred Barasa Matayo v Channan Agricultural Contractors* [2013] eKLR, the court reviewed downwards an award of Kshs 250,000/= to Kshs 150,000/= for moderate soft tissue injuries that were expected to heal in eight months' time.

54. In *Dickson Ndungu v Theresia Otieno & 4 others* [2014] eKLR, an award of Kshs 250,000/- was reviewed to Kshs 127,500/= for soft tissue injuries which produced no complains. In *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* [2015] eKLR, an award of Kshs 700,000/= was reduced to Kshs 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

55. Finally, in *FM (Minor suing through Mother and next friend MWM) v JNM & another* [2020] eKLR, an award of Kshs 60,000/- was enhanced to Kshs 100,000/- where the minor had sustained soft tissue injuries, which were blunt object injury to the head, neck, limbs thorax and abdomen.

56. In the instant appeal, evidence showed the respondent sustained soft tissue injuries involving marked swelling and bruises on the forehead, marked neck and chest pain and cut wound on the right elbow

joint and right knee joint. He was treated as an outpatient. In light of the authorities produced above, I find the sum of kshs 80,000/- to be sufficient for pain, suffering and loss of amenities. The award of Kshs 100,000 is hereby set aside and substituted with an award of Kshs 80,000 general damages which will attract interest at court rates from the date of judgment in the lower court until payment in full.

57. Consequently, the appeal herein is only successful in so far as quantum of damages is concerned. The appeal against liability is dismissed.

58. Each party to bear their own costs of the appeal.

59. File closed.

Dated, Signed and Delivered at Kisumu this 18th Day of January, 2023

R.E. ABURILI

JUDGE