Ongallo & another v Waichari (Civil Appeal E077 of 2021) [2024] KEHC 9652 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E077 OF 2021

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

SAMSON BENSON MUTERE ONGALLO .... 1ST APPELLANT

ROBERT OBIRI .... 2ND APPELLANT

AND

FRANCIS MWANGI WAICHARI .... RESPONDENT

(Being an appeal from judgement and decree of Honourable Hon. R.W. Gitau RM dated 10-05-2021 in Mavoko Chief Magistrate Court civil case no. 333 of 2019)

JUDGMENT

1. This appeal arises from judgement and decree of the subordinate court in which the appellants were found 100% liable for accident which occurred on 13-03-2019 involving the respondent and motor vehicle registration number KBV 926N. The respondent was said to have sustained a cut wound on the upper lip and multiple bruises on the left foot and was awarded a sum of Kshs 120,000.00 for pain and suffering and loss of amenities and special damages of Kshs 3,550.00. The appeal is both on liability and quantum of general damages.

2. The 1st appellant was the owner of the motor vehicle whereas the 2nd appellant was the driver of the same at the time of the accident. The appellants have faulted the honourable magistrate on 6 grounds. The six grounds can be collapsed into two that is; the finding on liability was erroneous and that the quantum of damages for general damages for pain and loss of amenities was too high such that it amounted to an erroneous estimate. The appellants have asked this court to set aside the judgement and replace it with its own assessment.

3. This is a first appeal and I am in law required to re-evaluate and re-examine the evidence produced before the lower court and come to my own independent conclusion. I must however bear in mind

that I did not have the advantage of taking the evidence and observing the demeanour of the witnesses. In Bwire v Wayo & Sailoki (2022) KEHC 7 (KLR) it was held that;

> 'A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgement and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing witnesses first hand.'

4. The respondent testified that on 13-03-2019, he was crossing road at llolongo where there was a zebra crossing when he was hit by motor vehicle registration number KBV 926N. According to him, a personal car and a trailer stopped to give way for pedestrians to cross and while he was crossing, a matatu that was overtaking on the service lane did not stop and hit him. The driver wanted to escape but a crowd surrounded and stopped him and forced him to take the respondent to hospital. He added that he was taken to Shalom hospital where he was treated. He produced medical summary from Athi River Shalom Community Hospital dated 2-04-2019, P3 form dated 4-04-2019, copy of records for motor vehicle registration number KBV 926N, invoice for search dated 23-04-2019, statutory notice dated 11-04-2019 and demand letter dated 23-04-2019 as his exhibits 1, 3, 4, 5, 6, 7 and 8. The respondent blamed the 2nd respondent for overtaking and failing to give way. According to him, the matatu was rushing to get to the stage. He claimed that he didn't work for three months.

5. In cross-examination, the respondent insisted that he was crossing at a zebra crossing and that they were in a group. He did not have anything to show that the vehicle was speeding but he maintained that it was. He stated that the driver was charged in court but he did not produce any document to show that and he could not remember the traffic case number but he insisted that he went to court.

6. The second witness for the respondent was Dr Titus Ndeti who said that he examined the respondent on 9-04-2019 and confirmed that he had sustained injuries and prepared a medical report. He produced his medical report as exhibit 9 and receipt for the examination for Kshs 3,000.00 as exhibit 9A. He was cross examined and confirmed that the injuries were soft tissue. The respondent had told him at the time of the examination that he was experiencing pain on the injured areas.

7. The respondent's last witness was police constable Paul Mohengi attached to Athi River police station. He produced a police abstract for the accident. He told the court that the accident was reported vide occurrence book entry number 63/13/3/19. The police abstract was produced as exhibit 2. The officer stated in cross examination that he was not the investigating officer and that he did not visit the scene. He further stated that the OB indicated that the respondent was a pedestrian and it did not indicate that there was a zebra crossing. The witness added that the motor vehicle registration KBU (sic) was blamed.

8. The appellants called two witnesses. The first was the 2nd respondent. He told the court that he was the driver of the motor vehicle on the material day and that he was driving from Nairobi to Kitengela and upon reaching Mlologo where he was on the last lane to the left, he slowed down as the vehicle ahead of him was moving slowly. On the right side, there was a lorry and abruptly two people, a lady and a man appeared ahead. He applied brakes. According to him, the man had not seen his motor vehicle. The lady pulled the man's hand and the man fell and as a result the motor vehicle stepped on his right leg. The witness added that there was no zebra crossing in mlolongo at the time and he was driving at 50 KPH. He stated that he could not avoid the accident as the two people appeared abruptly.

9. In cross examination, the witness told the court that he was driving parallel to a lorry and that the people appeared from ahead of the lorry. He also stated that there was no flyover or zebra crossing. He

also said that he had been driving along the road for 5 years and 50 Kph was not a high speed. He stated that the lorry did not slow and the people crossed in haste.

10. The second defence witness was Corporal Zephania Amdany from Athi River police station. He brought and referred to the same OB referred to by PW3. He stated that the motor vehicle knocked down the respondent at mlolongo on the material day at 1700 hours. According to this police officer, no one was blamed for the accident. He produced another abstract as defence exhibit 1. When he was cross examined, the witness stated that before the foot bridge was erected, there used to be a zebra crossing and that the road was busy with many pedestrians. He also told the court that the respondent had not been blamed for the accident. He stated that there was no file relating to the accident.

11. The appellant filed submissions dated 1st March 2204. I have not seen the respondent's submissions. I have read through the submissions of the appellant, the pleadings, exhibits produced by the parties and the proceedings as recorded by the lower court. I have also read the judgement by the honourable magistrate. The magistrate found the evidence of the respondent more credible than that of the appellants and entered judgment on liability at 100%. She had the advantage of observing the demeanor of the witnesses unlike me. I would therefore be careful in disturbing her observation.

12. The appellants have submitted that the police officer did not blame either the respondent or the 2nd appellant. The appellants also submit that due to this fact and that the occurrence book did not indicate that there was a zebra crossing, the finding of 100% against the appellants was erroneous. It is true that the police report did not blame either the respondent or the 2nd appellant. However, that does not mean that the 2nd appellant could not be held 100% liable neither does it suggest that the respondent should be blamed for the accident.

13. The 2nd respondent is on record confirming that at the time of the accident, there was no flyover or foot bridge at the scene of the accident. DW 2 who was a police officer also confirmed that at the place the respondent was crossing, there was a zebra crossing.

14. The 2nd appellant stated that there was a vehicle ahead of him which was moving slowly. If that was the case, it means that the respondent would not have entered the road as stated by the said witness. The 2nd appellant did not tell the court the distance he kept between himself and the vehicle ahead of him such that one would be able to cross in between the two vehicles. At the same time, he said that there was a lorry which was driving parallel to him and the respondent and a woman emerged ahead of this lorry. It is inconceivable that the respondent would have rushed to cross ahead of the lorry going parallel to the 2nd appellant and at the same time be missed by the vehicle the 2nd appellant alleged was moving slowly ahead of him. I believe the version that there was a zebra crossing which means that the 2nd appellant should have slowed down to allow pedestrians to cross.

15. The fact that the 2nd appellant confirms that the respondent was crossing with a lady goes to corroborate the respondent's testimony that there were other people crossing at the place. A speed of 50 kilometers per hour is high on a zebra crossing. The 2nd appellant admitted that he had used the road for 5 years while his witness testified that the place was busy with human traffic. In those circumstances, the 2nd appellant should have been careful while approaching the place. I do agree with the analysis of the magistrate in respect of the 2nd appellant's evidence after which she found that his evidence was not tenable. In that regard I uphold the magistrate's finding that the 2nd appellant was 100% negligent. The 1st appellant was vicariously liable.

16. The appellants have urged me to find that the award of Kshs 120,000.00 for the injuries sustained by the respondent was inordinately too high. It is trite law that an appellate court should not disturb an

award of damages unless the same is too high or too low such that it amounts to an erroneous estimate when compared to other comparable decided cases and the trends of award for similar injuries.

17. It is not disputed that the respondent sustained soft tissue injuries. The appellant urge that the award should be reduced to between Kshs 50,000.00 and Kshs 100,000.00. They have relied on the case of Power Lighting Company Limited & Another vs Zakayo Siataoti Naingola & Another (2008) eKLR. Unfortunately, the appellant has not assisted the court by attaching the cited authority. It is prudent and incumbent of parties who cite authorities to provide copies of the same for the court's consumption. Perhaps the appellants expected the court to find the authorities online but it is for good of the parties to assist the court and hence help their case. Be that as it may, I have compared the respondent's case to the following decided cases.

    a. Ogembi & Another v Arika (2022) KECH 12219 (KLR) where the respondent had sustained a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle and bruises on the right toes and left knee. In the said case Honourable Justice R.E. Ougo reduced general damages awarded by the lower court to Kshs 180,000.00 on 28-07-2022.

    b. Rege v LA (2022) KEHC 16634 (KLR) in which Honourable Judge awarded a sum of Kshs 150,000.00 to the respondent who had sustained bruises on the right hand, blunt trauma to the right hand and chest contusion.

18. I appreciate the fact that no injuries in one incident or accident can be exactly be the same as in another. All the court needs to do is to make comparison of the nature of injuries with the general trends of awards by other courts. I believe that the authorities I have cited above fairly compare to the respondent's case. An appellate court should not set aside an award of the trial court simply because it thinks that it would have awarded a different sum. General damages are damages at large and are better left at the discretion of the trial court and unless it is shown that the trial court applied the wrong principles or considered irrelevant factors or left out relevant factors, the appellate court should be reluctant to upset the trial court's discretion. It was held in Johnson Evan Gicheru v Andrew Morton & Another (2005) eKLR, by Court of Appeal that;

> 'It is trite that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'

19. I have considered the nature of injuries and made comparison of the same to the cited relevant authorities. I hold that it has not been satisfactorily shown that the magistrate applied wrong principles or considered an irrelevant factor or left out a relevant factor.

20. In the circumstances there is no basis for disturbing the award of Kshs 120,000.00. This appeal is found to have no merits and it is hereby dismissed.

21. Since the respondent did not participate in the appeal, I make no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Miss Obwogi for the respondent and in absence of the respondent.