Maxwel & another v Omwenga (Civil Appeal 749 of 2022)
[2024] KEHC 9222 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9222 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 749 OF 2022

RC RUTTO, J

JULY 26, 2024

BETWEEN

MULINGE MAXWEL ..... 1ST APPELLANT

CATHERINE NYACHOMBA NJOROGE ..... 2ND APPELLANT

AND

DISMAS OMWENGA ..... RESPONDENT

(An appeal arising from the judgment and decree of Hon. E. Wanjala Principal Magistrate delivered on 26th August 2022 in Chief Magistrate Court at Nairobi Milimani Commercial Courts Civil Suit No E3841 of 2020)

JUDGMENT

Background

1. This is an appeal against the judgment delivered on 26th August, 2022 in which the trial court held the 1st appellant 100% liable for the accident and the 2nd appellant vicariously liable for being the registered owner of the motor cycle Registration No. KMED 921 Q. The trial court proceeded to award Kshs 950,000/= as general damages for pain and suffering, Kshs 5,550/= as special damages and Kshs 200, 000/= as future medical expenses costs and interest.

2. Aggrieved by this judgment, the aappellant's appealed to this court vide a memorandum of appeal dated 23rd September, 2022 seeking that the Appeal be allowed and the suit determined before the trial Magistrate be dismissed with costs. They also seek the court to reassess the quantum and reduce the award.

3. The Appeal is premised on the following grounds;

a. The Learned Magistrate erred in law and fact by holding the Appellant 100% liable for the accident when the Respondent admitted that he was knocked at the yellow line by the alleged Appellants Motor Vehicle when he was trying to cross the road.

b. The Learned Trial Magistrate erred in law and fact in failing to properly analyse the evidence before her which clearly established that the Respondent was substantially to blame for the subject accident for failing to ensure that the road was safe before attempting to cross.

c. The Learned Magistrate erred in law and in fact by applying wrong principles of law while assessing damages which is manifestly high and excessive in the circumstances.

d. The Learned Magistrate erred in law and in fact by failing to discount the sum paid to the Respondent under the Work Injuries Benefit Act (WIBA) from the court award.

4. The particulars of the case before the trial court are contained in an Amended Plaint dated 21st August, 2020 where the plaintiff now respondent prayed for general damages, pain and suffering, special damages, future medical expense costs and interest.

5. The respondent case was that on the 8th September, 2017 at about 12:30p.m when he was crossing Dunga Road within Industrial Area, in blatant disregard to the surrounding and without due regard to the people around him, the 1st Appellant, while in the course of employment, so carelessly, negligently and/ or recklessly, mismanaged and/or rode Motor Cycle Registration Number KMED 921Q thereby causing it to violently hit the Respondent causing him to sustain grievous injuries. The respondent averred that the accident was jointly and severally caused by the 1st and 2nd appellants' negligence.

6. The respondent injuries are particularized as follows;

a. Compound fracture of the right tibia and fibula.

b. Cut wound temporal scalp.

c. Multiple cut wounds both arms.

d. Markedly swollen right lower limb and tender on palpation

e. Depressed 10cm anteromedial scar on middle 1/3 right leg

f. Predisposition to post-traumatic osteoarthritis of the right ankle and knee joints.

g. Permanent incapacity estimated at 20%.

7. The defendants, now appellants, case was contained in a statement of defence dated 27th January 2021 in which they denied any negligence on their part and averred that if at all it occurred, it was a result of the respondent's negligence which were particularized to include; abruptly and without any reason crossing the road at a place not designated for zebra crossing, walking absent minded on the road and failing to see Motor Cycle Registration No. KMED 921Q in good time so as to avoid crossing the road on the face of danger. The appellants prayed that the claim be dismissed with costs.

The Parties' Submissions

Appellants' Submissions

8. The Appellants relied on their submissions dated 29th May, 2024 in which they submitted on four grounds namely; whether the trial court erred in holding the Appellants 100% liable given the facts and circumstances of the accident, failure of the court to apply the applicable principles in the assessment of

damages; whether the court erroneously awarded Kshs 200, 000/= as future medical expenses without any basis and whether the compensation under the Workmen's Compensation Act (now repealed) paid by the Insurance should be deducted from the final award.

9. On the issue of liability, the appellants submission was that there was a misapprehension of the provisions of section 107 of the *Evidence Act* in finding that the appellants were liable, just because they did not offer evidence. That it is not automatic that when a defendant does not call any witness then the suit is unopposed or uncontroverted. Consequently, the trial court ought to have analyzed the evidence adduced and come to a conclusion that the respondent had discharged the burden of proof. Reference was made to the case of Milka Akinyi Ouma vs Kenya Power Lighting Co Limited & Anor (2020) eKLR

10. It was submitted that the Appellants' in their defence raised an issue of contributory negligence particularly that the Respondent was crossing the road at a place not designated for pedestrian crossing hence contributing to the occurrence of the accident. The Appellants made reference to the Highway Code which gives guidelines on crossing and the case of Patrick Mutie Kamau & Another v Judy Wambui Ndurumo (1977)eKLR.

11. The court was urged to find that the Respondent was entirely to blame for the accident since the Respondent breached Rule 5 of the Highway Code which commands, "Do not cross until there is safe distance in the traffic and you are certain that there is plenty of time. Remember even if traffic is long way off, it may be approaching very quickly."

12. The Appellant urged the court to find that the totality of the evidence presented in the trial court was not sufficient to find the appellants entirely to blame for the accident hence the suit before the trial court should be dismissed.

13. On the second issue the Appellants made reference to the case of Jabane vs Olenya (1989) KLR 1 that stated that comparable injuries should attach comparable award. Guided by the above principles the Appellant made reference to the case of Kenya Power and Lighting Company Limited & Another Vs Zakayo Saitoti Naingula & Anor (2008)eKLR; Bhachu Industries Limited & Peter Kariuki Mutaru (2015) eKLR; and Francis Ochieng & Another Vs Alice Kajiana (2015) eKLR all which the plaintiffs suffered strikingly similar injuries as the present one and the courts awarded damages of between Kshs 300,000/- to kshs 400,000/-

14. In relying on the case of *Jane Wanja Mwangi v Anestar Secondary School (2020) eKLR Civil Appeal No. 13 of 2018*, the Appellant submitted that the assessment of damages of the trial court at Kshs 950, 000/= was inordinately high and wholly erroneous estimate of damages.

15. The third issue is on the award of Kshs 200, 000/= as future medical expenses. The Appellants submitted that the award was made without any evidence. First, that the doctor's opinion was not specific as it only stated that it was meant for orthopaedic management and at the same time he said physiotherapy, second, the treating doctor did not recommend the Respondent to undergo physiotherapy.

16. The Appellant lastly submitted that from the Respondent's documentation, the Respondent was covered under the Workmen's Compensation Act (now repealed) hence the sum of sum of Kshs 325, 000/= paid by the Insurance needed to have been deducted from the final award and establish if the payment related to the same injury. The Appellant also urged the court to take into account the doctrine of subrogation. Reliance was placed on the case of Nyeri Civil Appeal No. 67 of 2010 AAA Growers Vs Ann Wambui (suing as the Administrator in the Estate of Thomas Wahome Wambui 7 Anor (2016).

17. They urged the court to allow the appeal, dismiss the suit before the trial court and in the alternative, apportion liability at 50% and re-asses the quantum of damages, less the sum paid under the Work Injury Benefit Act.

Respondent Submissions

18. The Respondent relied upon their submissions dated 8th May, 2024 in which they set out seven issues as follows; whether the appellants were 100% liable for the accident; whether the trial court erred in law and fact by allegedly failing to substantially blame the respondent for the occurrence of the accident; whether the trial court applied wrong principles of law to assess damages; whether the damages awarded were manifestly high and excessive in the circumstance of the case; whether the trial court erred in fact and law in not discounting the sum paid to the respondent under the Work Injuries Benefit Act (WIBA); whether the trial court arrived at her decision in a speculative and cursory manner and thereby failed to exercise her discretion judiciously; whether the appeal should be dismissed with costs in favour of the respondent.

19. It was the respondent submission that failure to adduce any evidence meant that the evidence adduced by the respondent against the appellant was uncontroverted and unchallenged. To support this argument the respondent referred to the case of Interchemie EA Ltd vs Nakuru Veterinary Centre Ltd and Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 Others.

20. On liability, it was submitted that the Appellants did not adduce any evidence to give an account of how the accident occurred and further, the 1st Appellant was in breach of the Highway Code and *Traffic Act* in not keeping left and careless driving respectively and as such the Appellants should be found 100% liable for the accident.

21. As regards quantum, it was submitted that PW1, Dr Moses Kinuthia confirmed the injuries that that the Respondent sustained as stated in the plaint and medical report and that after the Respondent was admitted at Nairobi West Hospital for 7 days, he was advised to attend hospital for orthopedic management and physiotherapy. It was submitted that the Respondent still walks with crutches and he sustained 20% permanent incapacitation. It was submitted that the Trial court in awarding general damages of Kshs 950, 000/= plus Kshs 200, 000/= as further medical expenses based on Dr.Kinuthia's report, applied the correct principles of law.

22. On whether the court should have deducted the amount paid under WIBA by the Respondent's employer from the damages awarded by court, it was submitted that the Appellants and the Respondents were not in an Employment Relationship and that WIBA would only be deducted from an award granted in a common law suit in a claim against the employer paid under WIBA by the Respondent's employer from general damages awarded by court which is not the case in this instant appeal.

23. The court was urged to dismiss the Appeal as it lacks merit and the Respondent be awarded the costs.

Analysis and Determination

24. This being the first appeal from the trial court, 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 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. In the case of Selle vs Associated Motor Boat Co [1968] EA 123 it was emphasised 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 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 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."

25. Based on the above this court sets out the following issues for determination:

    a. Whether the Trial court erred in finding that the Appellants were 100% liable?

    b. Whether the quantum awarded was excessive?

    c. Whether the court erred in awarding the future medical expense to the respondent.

    d. Whether the Trial Court ought to have deducted the amount paid to the Respondent under the *Work Injury Benefits Act* (WIBA)

    Whether the Trial court erred in finding that the Appellants were 100% liable

26. It is undisputed that an accident took place on 8th September, 2017 where the Respondent was hit by the Appellants' motor cycle Registration number KMED 921Q (hereinafter referred to as 'the subject motor cycle').

27. The respondent testified that he was crossing Dunga Road within industrial Area. He looked left, right and left again and saw a motor bike 100m away that turned suddenly from CMC Round about, as he had started to cross the road. Following that, he opted to stand on the yellow line to let the motor cycle pass but instead it hit him. He blamed the rider for the accident. During cross-examination, he stated that he was crossing the road and saw the motor bike being driven at high speed on the lane andthat there were no other vehicles.

28. In determining liability the trial court while relying on the authority of Motex Knitwear Limited Vs Gopites Knitwear Mills Limited (2009)eKLR held that the defendants did not tender any evidence to challenge the plaintiff's evidence that the 1st defendant was negligent while riding the subject motorcycle hence causing the accident. Consequently, the trial court, held the 1st defendant 100% liable for the accident and 2nd defendant was held vicariously liable.

29. I make reference to the provisions of Section 107 and 108 of the *Evidence Act* to the effect that he who asserts or pleads must support the same by evidence. The upshot of this is that a defence without any evidence tendered to support the facts stated hereto remain as statements of fact, and are of no evidential value which then leaves the evidence of plaintiff's now respondent case as unchallenged and uncontroverted.

30. Be it as it may, that is the respondent case being unchallenged and uncontroverted, the dictates of common sense also apply in this case, regarding the facts as set out by the respondent. By way of restating and I reiterate, the respondent stated that "i was crossing Dunga Road within industrial Area..., I looked left, right and left again I saw a motor bike 100m away that turned suddenly from CMC Round about, as I had already started to cross the road."

31. This evidence shows that by the time the respondent was looking to the left again, he had already started to cross the road showing that he did not wait for the road to be clear before crossing. The Highway Code for all Road users provides for instructions on how pedestrians should cross the road it states; Look right, look left, look right again, then listen before crossing the road. DO NOT run • If traffic

is coming, let it pass. Look all around again and listen • Do not cross until there is a safe distance in the traffic and you are certain that there is plenty of time. Remember, even if traffic is a long way off, it may be approaching very quickly • Do not cross the road diagonally • Avoid crossing the road at a sharp bend

32. In this instance, therefore, the respondent by his own admission confirms that by the time he was looking left again, he saw a motor bike 100 meters away but he had started crossing. Had he followed the recommended instructions before crossing the road he would have averted the accident.

33. In Stanley –v- Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:

> " To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it.... The question must be determined by applying common sense to the fact of each particular case. In the circumstances, the trial court noted that the plaintiff contributed to the accident and on a balance of probability both parties were to be held responsible in equal portions."

34. In my opinion based on the above set of facts none of the parties can claim to be totally blameless for the accident. In the circumstance therefore and on a balance of probability, I find that the respondent is equally to blame for the accident. I proceed to find both the 1st appellant and the respondent liable for the accident. I apportion the liability at 50:50 in favour of the respondent against the appellant.Whether the quantum awarded was excessive in the circumstance

35. On the issue of quantum, 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."

36. The Respondent injuries are as pleaded and particularised in the Plaint dated 4th August 2020 and supported by the medical report dated 9th July 2020. The particulars of the injuries are as follows;

    a. Compound fracture of the right tibia and fibula

    b. Cut wound temporal scalp

    c. Multiple cut wounds both arms

    d. Markedly swollen right lower limb and tender palpation

    e. Depressed 10cm anteromedial scar on the middle 1/3 right leg.

    f. Predisposition to post-traumatic osteoarthritis of the right ankle and knee joints

    g. Permanent incapacity estimated 20%

37. The trial court in granting the award of damages considered the various authorities referred to by the parties. The court was then guided by the case of George William Auwor Vs Beryl Awuor Ochieng (2020) eKLR in which an award of kshs 2,000,000 in general damages was substituted with kshs 1,200,000 for the following injuries; tibia fibula fractures were compounded while the femur fracture was simple, the right thigh had surgical scars and some bruising which had since healed but the nail was still in situ and she would have to undergo surgery to remove the nail. Thus, this court seeks to establish whether the award was excessive in the circumstance as pleaded by the appellants.

38. The Appellant submitted that the assessment of damages of the trial court at Kshs 950, 000/= was inordinately high and wholly erroneous estimate of damages. I do not agree with the appellants assertions, as is already settled those comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly similar. I find that the trial court was well guided by the authority of George William Awuor (Supra). I do not find a justifiable reason to disturb the finding of the trial court on general damages for pain and suffering. This ground of appeal fails.

Whether the court erred in awarding the future medical expense to the respondent.

39. The trial court awarded the future medical expense to the respondent assessed at kshs. 200,000 as pleaded and proved by the medical report.

40. The Appellants are aggrieved by this award on the grounds that the recommendation made by PW1 Dr. Moses Kinuthia which the court relied upon had no basis. Notably the appellant did not adduce any evidence to counter the evidence of PW1.

41. It is noted that the medical report opined that the respondent will require orthopaedic management and several physiotherapy sessions at an estimated cost of kshs. 200,000/-. At the hearing, PW1, Dr. Moses Kinuthia stated that the respondent required orthopaedic management at a cost of kshs.200,000/=. On cross examination he further stated that the respondent will require 20 sessions and orthopaedic management osteoarthritis every two months and that the charges were based on the charges at Nairobi West Hospital where he practiced.

42. In Parvin Singh Dhalay vs Republic [1997] eKLR; [1995-1998] 1EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.

43. In my considered view, and on a balance of probabilities, the respondent proved the costs for future medical expenses through the medical report and evidence submitted in court by PW1 Dr. Moses Kinuthia. Consequently, I therefore do not agree with the submissions of the Appellants.

44. To this end, I find that the trial court considered the applicable principles. The court did nor err in awarding the future medical expenses and as such I will not interfere with the trial court's finding on this.

Whether the Trial Court ought to have deducted the compensation awarded under *Work Injury Benefits Act* (WIBA)

45. The Appellants submitted that the trial court ought to have deducted the amount of Kshs 325,000/= from the decretal sum, as the Respondent admitted to having received this amount.

46. On the other hand, the Respondent submitted that the Appellants and the Respondent are not in an Employment Relationship and that WIBA would only be deducted from an award granted in a common law suit in a claim against the employer paid under WIBA by the Respondent's employer from general damages awarded by court which is not the case in this instant appeal.

47. Despite the appellants raising this argument in their submission, the same was not considered by the trial court. I have carefully considered the rival submissions and the holding of the High Court in the case of Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib [2017] eKLR where the court held;

> It is established that subrogation does not extend to personal accident claims. I do entirely agree with this view as the opposite would be to allow negligent tortfeasors go scot free only because their victims were careful enough to take up personal accident policies.
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> In "General Principles of Law" 6th edition (E.R. Hardy Ivamy", the author states as follows at page 493: -
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> "In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of "subrogation' are entitled dot be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.
>
> Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity."
>
> In "Bird's Modern Insurance Law" (7th edition) – JOHN BIRDS, the author states as follows in chapter 15 under "subrogation": -
>
> "This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The "fundamental rule of insurance law" is "that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified". A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points-: subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance.

48. Further section 17 of the WIBA Act provides as follows:

> 17.
>
> (1) If an occupational accident or disease in respect of which compensation is payable, was caused in circumstances resulting in another person other than the employer concerned (in this section referred to as the 'third party') being liable for damages in respect of such accident or disease-

(a) the employee may claim compensation in accordance with this Act and may also institute action for damages in a court against the third party; and

(b) the employer or insurer by whom compensation in respect of that accident or disease is payable may institute action in a court against the third party for the recovery of compensation that the employer or insurer, as the case may be, is obliged to pay under this Act.

2) In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the compensation paid in accordance with this Act.

49. A plain reading of the above section and as guided by the case of Leli Chaka Ndoro (Supra) the court only need to take into consideration the compensation relating to section 17(1)a of the WIBA. The arrangement between the respondent and his employer cannot be of benefit to the appellants for their act of negligence. Consequently, in determining the amount payable as damages, any benefit arising from WIBA cannot be considered by the court as part of the general damages payable. That's a different arrangement and contract not relevant to these proceedings.

50. Consequently, the trial court did not err when it failed to deduct the award of compensation granted under WIBA. I find that this ground of appeal fails

Orders

51. Accordingly, for the reasons set out above, the Appellants' appeal partially succeeds and judgment is entered as follows: -

a. Liability is apportioned at 50:50 between the parties.

b. The award of General damages of Kshs 950, 000/= is upheld

c. Special damages of Kshs 5,550/= is affirmed.

d. Future medical expenses of Kshs 200, 000 is affirmed.

52. Costs of the Appeal will be borne by each party as the Appeal was partly successful. Costs and interest of the lower Court are not interfered with.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF JULY 2024

For Appellants

For Respondent:

Court Assistant:Peter Wabwire