Muhoro v Mukesya (Civil Appeal 42 of 2020)
[2024] KEHC 9810 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 42 OF 2020

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

MARTIN MUHORO ..... APPELLANT

AND

DANCAN MUTUA MUKESYA ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Peter Muholi Senior Resident Magistrate in Nairobi CMCC No. 5015 of 2015, delivered on 6th February, 2019)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Resident Magistrate's Civil Suit No. 5015 of 2015. In the said suit, the respondent (who was the plaintiff) sued the appellant (who was the defendant) for both general and special damages arising from a road traffic accident in which he sustained serious bodily injuries.

2. The appellant was the driver of the motor vehicle registration number KAX 662E which hit motor cycle registration number KMCU 373D along outering road on which the respondent was lawfully riding. The claim was fully defended and the trial Magistrate in his Judgment apportioned liability at 100% in favour of the respondent.

3. The Court awarded him general damages of kshs 750,000/= and special damages of kshs 10,100/= together with interest payable from the date of the judgement until payment in full. The respondent was also awarded costs of the suit.

4. The appellant being aggrieved by the whole judgment lodged this appeal dated 16th January, 2020 setting out the following grounds: -

i. That the learned trial magistrate erred in law and in fact in failing to find that the liability in the matter was not proved as against the appellant at 100% or at all. The whole judgement on liability was perverse and was not supported by the evidence tendered in court.

ii. That the learned trial magistrate erred in law and in fact by apportioning 100% Liability against the appellant and if the court had analysed the evidence carefully the trial court would have found that the liability had not been proved at 100% against the appellant or better still it would have reached an apportionment of liability considering that this was a collision of a motor cycle registration number KMCU 373D and the motor vehicle Reg. No. KAX 662E. Each owed a duty of care to the other and vice versa.

iii. That the learned trial magistrate erred in law and in fact by heavily putting a lot of weight on the evidence of the respondent and his witnesses even when the said witness testimony was insufficient as the respondent was wrongly on the road as_ he has no riding license and none were produced in court as documentary evidence to back up his claims and in consequence the respondent case did not reach a threshold of a balance of probability to warrant an award.

iv. The learned trial magistrate erred in law and in fact by awarding general damages at kshs760,000/= in total disregard of the appellants submissions and existing court awards in similar cases. The award herein is excessively and inordinately high that it constitutes a wholly erroneous estimate of the damage.

v. That the learned trial magistrate erred in law and fact by acting on a wrong principle in reaching his findings by relying on evidence that was not direct, that was not corroborated and appearing and indeed lowered the standard of proof in civil cases.

vi. That the learned trial magistrate erred in law and fact in failing to consider the appellant cross-examination, by failing to consider the appellant evidence. In that sense the trial magistrate misdirected himself.

vii. That the entire judgement was against the law and the weight of the evidence on record and was therefore for interference as it was clearly wrong.

5. The appeal was canvassed through written submissions.

Appellant's submissions

6. The appellant filed his submissions dated 28th September, 2021 through Arusei & Company Advocates. Counsel submitted on both liability and quantum.

7. On liability, counsel submitted that there could be no excuse for the respondent not to completely see the car and therefore the finding that the appellant was 100% liable for the accident amounted to a grave misdirection. Further, that the same was not supported by the evidence tendered in court. He added that the two elements in the assessment of liability included causation and blame worthiness. He referred to the case of *Isabella Wanjiru Karanja and Washington Malele* Court of Appeal at Nairobi Civil Appeal No.50 of 1981 found at page 106 of the record of Appeal.

8. Counsel submitted further that the respondent's witness led no evidence to prove any particulars of negligence as pleaded in the plaint and that the police never found the appellant's driver at fault. He referred to the case of *Kenya Kazi Limited v Nandwa* [1988] eKLR where the court held as follows;

> "…….In an action for negligence the plaintiff must allege and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the

issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not Shift....."

9. Counsel went on to submit that it was not clear who between the appellant and the respondent was to blame for the accident, and the trial court ought to have apportioned liability. The court's attention was drawn to the cases of *Julius Omollo Chanda & Joyce Menga v Samson Nyaga Kinyua* Civil Appeal 608 of 2007, *M. Jones v Livior Quarries Ltd* 1992 2 QB 608, *Immaculate Kanini Mulwa v Daniel Maguru Irungu* [2019] eKLR and *James Wanjiru Muturi & Another v Samuel Irungu Ngugi* [2017] eKLR.

10. On the issue of quantum, counsel submitted that the honourable Magistrate relied on the wrong principles in reaching his findings. Further, that there were two medical reports produced as evidence, the first one dated 17th November, 2016 by Dr. Cyprianus Okoth Okere who found the respondent to have sustained a fracture of the left tibia and fibula amounting to a 30% permanent incapacity. The second medical report dated 3" July,2017 by Dr. Maina Ruga confirmed the said injuries but assessed permanent incapacity at 10%.

11. Counsel submitted further that the respondent had a fracture of the left tibia and fibula. Guided by the cases listed below, he urged the court to award kshs 200,000/= as compensation. He cited the cases of:

    i. *Isaac Mwenda Micheni versus Mutegi Murango* NRB HCCC 335 of 2004 [2004] eKLR where the plaintiff suffered a fracture of the left tibia and fibula together with soft tissue injuries including a wound on the scalp, cut wound on the knee and bruised right forearm and was awarded kshs 100,000/in 2004.

    ii. *Gogni Construction Company Limited v Francis Ojuok Olewe HB* HCCA No.1 of 2014 [2015] eKLR, where the claimant was awarded kshs350,000/= as general damages having sustained a fracture of the left distal radius and dislocation of the left elbow and was hospitalized for 6 weeks. The court in that case stated that even factoring inflation in these more recent awards, the award of kshs 1,000,000/ was obviously excessive.

12. He urged the court to allow the appeal with costs to the appellant.

Respondent's submissions

13. The respondents' submissions were filed by Musili Mbiti associate advocates and are dated 26th January, 2024. Counsel submitted that the respondent had proved his case in regard to liability and contribution of negligence by giving his testimony of what transpired. Further, that the testimony of PW2(Traffic Officer) confirmed that the accident occurred and was reported at Buruburu police station. He placed reliance on section 107 and 109 of the *Evidence Act* and the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 333.

14. Counsel submitted further that the appellant called only witness who gave contradicting testimony. That the said witness claimed that the accident occurred on the left side of the road and his vehicle was damaged on the left side. However, upon cross examination he stated that his vehicle was hit on the right side. Counsel thus submitted that the respondent had proven his case on a balance of probability and the learned Magistrate did not err in law or principle in apportioning liability at 100% in favour of the respondent.

15. On quantum, counsel submitted that the respondent had sustained serious injuries and Dr. Maina Ruga had assessed permanent incapacity at 10%. Further, the injuries sustained by the plaintiffs in the

authorities cited by the appellant in his submission before the trial court was not comparable to the injuries sustained by the respondent. He added that the trial Magistrate gave an award of kshs 750,000/ = after considering the evidence presented before court, parties' submissions and authorities cited.

16. He submitted further that it was not a must for the learned trial Magistrate to consider authorities cited by the parties. That it was within his/her discretion to find the relevant one if any and if none then he/she had a duty to rely on any other that may be appropriate for each case. He placed reliance on the case of *Peter Namu Njeru. v Philemone Mwagoti* {2016] eKRL, where Hon. Justice P.J.O. Otieno stated that;

> " In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirely erroneous estimate of compensation to which the respondent was entitled or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was wholly injudicious not expected of a reasonable adjudicator". He further stated that; "This court takes notice that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be of binding nature on the trial court being a subordinate court. However, the duty to assess damages remains a discretionary factor and there must be a clear and demonstrable show that there was an error to invite interference by an appellate court".

17. He urged the court to dismiss the appeal.

Analysis and determination

18. This being a first appellate court, I am guided by the dictum in the case of *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

19. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

20. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issues for determination to be as follows:

    i. Whether the trial magistrate erred in finding the appellant wholly to blame for the accident.

    ii. Whether the award on general damages was inordinately high.

21. On the first issue, I refer to the Court of Appeal decision in *Michael Hubert Kloss & Another V David Seroney & 5 Others* [2009] eKLR, where it was held:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2) (1953) AC 663 at p. 681* as follows:
>
> "To determine what caused 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 facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

22. Further, in *Farah v Lento Agencies* [2006]1 KLR 124,125, the Court of Appeal held that: -

> " ...Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame."

23. Guided by the above cited authorities, this court in determining liability must consider the facts of the case and make a finding as to what mainly contributed to the cause of the accident. To be considered will be identification of the party that was at fault. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

24. This court has considered the evidence adduced before the trial court. It is not in dispute that the respondent was the driver of motor cycle KMCU 373D which collided with motor vehicle KAX 662E being driven by the appellant. The respondent who testified as PW3 did not tell the court much on how the accident occurred. He blamed the driver of the motor vehicle that hit him. He testified further that he was on his lane heading to Kawangware when the driver of the motor vehicle came to his lane. He added that he had a helmet, reflector, head lights were on and his speed was moderate.

25. On cross examination, PW3 stated that he was headed to Kariobangi from Pipeline and the accident occurred at Mutindwa. He added that they were going in opposite directions and the accident occurred on his lane.

26. PW2 (No. 86360 PC Andrew Hesbon Lugalia) who was not the investigating officer testified that the accident involving motor vehicle KAX 662E and motor cycle KMCV 373 took place on 15th May 2013 at 4.00pm along Outering road near Mutindwa bar.

27. Upon cross examination, he confirmed that the motorcycle registration number was KMCU 373 and that he was not the investigating officer. He stated that the case was pending investigation and he did not know if the owner of the motor vehicle had been charged in court or was to blame for the accident. He added that he was not able to get the sketch plan from the investigating officer.

28. The appellant (DW1) was the only defence witness and he testified that on 18th May 2013 while driving along Outering road, there was a motorcycle being driven at a high speed from the opposite direction and he swerved to the left to avoid a collision. That the said motor cycle followed him and hit him. He testified further that the case was pending investigations and he had not been charged in court or blamed for the accident.

29. In cross examination, he confirmed that the accident occurred on the left-hand side and the right side of his vehicle was hit. He stated that the motor cycle was coming from the opposite direction and he saw it at a distance of 50 metres and tried to swerve but he hit the rider.

30. He confirmed further that visibility was good and he was driving at a speed between 10-20kph but the motor cycle was being driven at a high speed. He added that the motor cycle was on his lane at the headlight road which was not properly marked and that he had fled the accident scene to avoid being lynched by other motor cycle riders at the scene.

31. The trial court in its judgment faulted the appellant for occasioning the accident. It stated that the appellant having seen the respondent on his lane, he ought to have swerved on the right to allow him go to his left. He added that the respondent had shown on a balance of probability that the appellant was the one who drove to his lane. He therefore held the appellant 100% liable.

32. After analysing all the evidence above, this court notes that both the appellant and respondent claimed to be on their rightful lanes when the accident occurred. However, the appellant admitted to having seen the respondent approaching from a distance so he tried swerving to avoid hitting him but it was too late. This court notes further that there was no police investigations report produced showing who between the motorcycle rider and the motor vehicle driver was at fault. PW2 told the trial court that the investigation of the case was still pending. The investigating officer was never called to testify. PW2's evidence did not assist the court on this point.

33. In view of the forgoing, it is my opinion that the respondent's evidence did not prove on a balance of probabilities (which is the standard of proof in civil cases) that what mainly contributed to the cause of this accident was the manner of driving by the respondent. In addition, none of the aforementioned parties in this case presented any evidence to show that they were not liable, for the causation of the accident.

34. Consequently, this court finds that the decision by the trial magistrate finding the appellant 100% liable was erroneous and therefore the same is set aside and substituted with an apportionment of liability in the ratio of 60%:40% in favour of the respondent. I rely on the several cases cited above.

35. The next issue is whether the award on general damages was inordinately high. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another* (No.2) (1987)) KLR 30 stated as follows:-

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

36. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated as follows: -

> " comparable injuries should attract comparable awards".

37. In awarding quantum, the trial magistrate considered the medical reports by Dr. Okere and Dr. Maina Ruga which confirmed the injuries sustained by the respondent and permanent incapacity at 30% and 10% respectively. He also considered the authorities relied on by both parties and went ahead to award general damages amounting to kshs 750,000/=.

38. This court has considered the award of kshs 750,000/= as made by the trial magistrate based on authorities cited by the parties in submissions at the trial court. The appellant in his submissions at the trial court cited several cases among them being *Samuel Waweru Wangombe v Mohamed Abdi Osman & Another*, Embu CA No. 8 of 2007 and *Paul Kimani Muna v Raphael Ndaiga Gathaiya*, Nyeri CA No. of 2006, where the plaintiffs therein were awarded general damages amounting to kshs 150,000/= respectively. The respondent on his part equally relied on several cases in support of his claim. The said cases include; *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR and *Charles Mwania & Another v Batty Hassan* [2008] eKLR where the plaintiffs were awarded kashs 700,000/= and 800,000/= respectively.

39. I have considered the cases relied on by both parties and also noted that the plaintiffs in the cases cited by the appellant at the trial court sustained multiple injuries which in my opinion cannot be likened to what the appellant sustained as none of them had permanent disability. Additionally, the cases he cited on appeal are not recent compared to the ones relied on by the respondent. On the other hand, in the authorities relied on by the respondent in his submission at the trial court, the plaintiffs therein sustained injuries which are similar to those he sustained. He therefore justified the claim for the award of kshs 750,000/=.

40. Upon doing a detailed observation from the evidence, medical reports, and decided cases, I find the award of Kshs 750,000/= not to be inordinately high.

41. The upshot is that the Appeal partially succeeds. The lower court Judgment is therefore set aside and Judgment entered in favour of the respondent in the following terms:

    i. Liability apportioned in the ratio of 60:40 in favour of the respondent.

    ii. General damages of Ksh 750,000/= confirmed in favour of the respondent less 40% contribution.

    iii. Special damages of Kshs 10,100/= confirmed

    iv. Half costs in both the lower court and High Court to the respondent.

    v. Interest at court rates from date of Judgment.

42. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE