Ngeresa v Gworn Petroleum Kenya Limited (Civil Appeal E611 of 2022)
[2024] KEHC 9056 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9056 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E611 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

PATRICK NGERESA ..... APPELLANT

AND

GWORN PETROLEUM KENYA LIMITED ..... RESPONDENT

(Being an appeal against the Judgment delivered in Nairobi CMCC No. 7121 of 2017 by the Hon. M/s. Margaret Murage Senior Resident Magistrate on 21st July, 2022)

JUDGMENT

1. The appellant who was the plaintiff in the lower court sued the respondent claiming special damages (Ksh 85,185/-) general damages, provision for future medical expenses plus costs and interest as a result of a traffic road accident involving the appellant's motor cycle registration No. KMDG 408L and the respondents motor vehicle registration No. KBQ 185Q along Nairobi – Mombasa road.

2. The appellant blamed the respondent for the accident. The respondent filed a defence denying the claim. The matter proceeded to full hearing with witnesses being called. In the Judgment delivered on 21st July, 2022 the trial court found the appellants not proved to the required standard. She found the appellant to be 100% for the accident.

3. Being dissatisfied with the Judgment the appellant filed this appeal citing the following grounds.

    i. The learned Magistrate erred in law and in fact in dismissing the plaintiff's suit yet it is manifestly clear that indeed the plaintiff was injured in the accident and proved by the evidence on record.

    ii. The learned Magistrate erred in fact and in law in applying a standard of proof higher in civil cases, that is on a balance of probability.

iii. The learned Magistrate erred in law and in fact in failing to hold that the plaintiff's case was unchallenged and uncontroverted and thus failed to wholly hold the defendant liable for causing the accident.

iv. The learned Magistrate erred in fact and in law in failing to award special damages despite production of receipts which were exhibited and produced in evidence during hearing.

v. The learned Magistrate erred in law and in fact in failing to award costs and interests of the learned Magistrate erred in law and in fact in the suit to the plaintiff.

vi. The learned Magistrate erred in law and in fact in failing to balance the weight of evidence by the plaintiff and that of his witness against that of the defendant thus arriving at an erroneous decision.

vii. The learned Magistrate erred in law and in fact in failing to consider the plaintiff's submissions and authorities filed court.

viii. The learned Magistrate erred in law and in fact in to totally misapprehending and misconceiving the plaintiff's suit and eventually dismissing the same contrary to the weight of the documents and evidence on record.

4. The appeal was canvassed by written submissions.

Appellant's Submissions

5. These were filed by Fred Mwihia's company advocates and are dated 8th March 2024. Counsel gave a summary of the evidence adduced in the lower court by the appellant's two witnesses and the respondent's one witness. He asked the court to rely on their submissions in the trial court. He thus submitted that the trial court relied on the evidence of DW1 which was not corroborated yet dismissed the one of PW1 which was corroborated by that of PW2. He adds that PW2 was the only eye witness present during the incidence yet the court disregarded his evidence which to him was an error.

6. Counsel contented that the trial court raised the standard of proof and in so doing reached an erroneous decision. He made reference to the case of Fredrick Wichinje Ikulwa v Florence Mwikali [2020] eKLR. He further submitted that the trial court erred in wholly relying on the police abstract ignoring the evidence of PW1 and PW2. He referred the court to the case of Florence Mutheu Musembi & Geofrey Mutunga Kinuti V Francis Karenge [2021] eKLR, where the court said:

> " A police abstract is merely evidence that a report of an accident has been made to the police."

7. It is counsel's submission that the trial court did not make a finding on the point of impact based on the evidence of PW1 and PW2. Instead it relied on the uncorroborated evidence of DW1, which he argues was a misdirection. It is his submission that DW1 never explained what he did to avoid the accident, which occurred on the highway. He urges the court to find the respondent 100% liable for the accident, as the vehicle was driven at high speed, making it to hit the appellant's motor cycle from behind.

8. Reliance was placed on the case of *Stanley Oguti Attai v Peter Chege Mbugua* [2019] eKLR. Where the court stated:

> " Further to the above, no evidence was adduced by the respondent as to whether he alerted the appellant and other road users of his vehicle coming from behind. Moving from behind the respondent was in a better position to see people walking ahead unless there was

obstruction which has not been stated. His duty to other road users was higher than that of pedestrians walking ahead of him"

9. On damages counsel submitted that the appellant suffered very serious injuries and the figure assessed by the trial court is very low. Citing the case of *Gabriel Mwashuma v Mohammed Sajjad & another* [2015] eKLR, counsel asked for Ksh 3,000,000/= as general damages.

10. He submitted that the appellant pleaded special damages of Ksh 85,165/= which he strictly proved. The same applied to the plea for future medical expenses of Ksh 250,000/=.

Respondents submissions

11. These were filed by Wangai Nyuthe & Company Advocates and are dated 17th April, 2024. Counsel submitted that the evidence from both the appellant's witnesses and the respondent's blamed the appellant for carelessly riding across the road despite the oncoming traffic. He referred to the police abstract (PEXB11) where the appellant was blamed for the accident.

12. He further picked on the following in blaming the appellant:He was not wearing a helmet or reflective clothing and he did not have a driving licence.The motorcycle was not insured.The evidence of the appellant and PW2 on the point of impact differed. Where did he emerge from? That the appellant and his witness (PW2) gave differing evidence.PW2's name was missing from PEXB1 yet he claimed to have witnessed the accident. That PW2 was not a truthful witness.

    He thus concluded that the appellant was the author of the unfortunate incident.

13. Counsel relied on the case of *Patrick Mutie Kamau & another v Judy Wambui Ndurumo* Civil Appeal No. 254 of 1996 where it was held:

> "a pedestrian owes a duty to other highway users to move with due care and follow the provisions of the highway code. Clearly, the accident was caused by the respondent running suddenly across the road without due regard to his own safety and that of others".
>
> Also see: *Julius Omolo Ochanda & another v Samson Nyaga Kinyua* [2010] eKLR and *David Mwangi Kariuki & another v Stephen Mwangi and another* [2017] eKLR.

14. Counsel contends that the appellant never furnished the court with evidence in respect of the respondent's negligence. Reliance was placed on the case of *Caren Auma Oyugi Okwiri v Emergency Relief Suppliers Ltd & another* 2017 where in holding that the claimant had not proved her case the court relied on the case of *Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another* [2010] eKLR where the court stated:

> "It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove".

15. Its his further submission that parties are bound by their pleadings. He cited the cases of *Daniel Otieno Migore v South African Nyanza Sugar Co. Ltd* [2018] eKLR and *Ann Waithera Njenga v Cube Movers Ltd* [2021] eKLR, in support.

16. On quantum counsel submitted that in cross examination the appellant confirmed he had resumed riding and has considerably recovered. Referring to the cases of:

i. *Paul Kithinji Kirimi & Another v Gatwiri Murithi* [2018] eKLR

ii. *Benard Musuu John v Jesman Distributors Ltd & Another* [2020] eKLR. Counsel submitted that both courts made an award of Kshs 450,000/= as general damages. He proposed an award of Ksh 500,000/= as adequate compensation.

17. Counsel further submitted that the appellant had not proved the claim for future medical expenses as there was nothing to show he had been attending any clinic or prescribed any medication. He argued that in the case of *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR and on the issue of future medical expenses the court stated as follows:

> "in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. [see *Winfield & Jolowicz on Torts*, 17th Edition 2002, at page 760] ....."

18. On the loss of future earning capacity, counsel submitted that the appellant did not avail any evidence to prove that he earned Ksh 30,000/= per month as claimed, nor his being a commercial rider. Finally, he argued that no special damage had been proved.

Analysis and determination

19. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence adduced and arrive at its own conclusion. It must bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the cases of *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1968] EA 123.

20. I have carefully considered the grounds of appeal, the record of appeal, submissions by both parties and the law. I find two issues falling for determination namely:

i. Who is to blame for causation of the accident?

ii. Whether the trial court's proposed assessment of damages is fair.

Issue No. (i) Who is to blame for causation of the accident?

21. From the evidence of the appellant and his witness (PW2) plus the respondent's witness (DW1), I find no dispute to the fact of an accident having occurred on 15th March 2016. The accident involved the appellant's motorcycle registration number KMDG 408L and the respondent's motor vehicle registration number KBQ 185Q. It occurred along Nairobi – Mombasa road. Both parties blamed each other for the accident.

22. The appellant told the court that he joined Mombasa road from Enterprise road and was hit by the respondent's speeding trailer. PW1 in his witness statement and even cross examination confirmed that

the appellant had joined Mombasa road from Enterprise road. Further in his evidence in chief he stated this at page 101 lines 6-7 of the record of appeal.

> " The trailer hit Patrick from behind along Mombasa road. It was from the Airtel road towards General Motors. The track is to blame".

23. DW1 in his witness statement stated that as he drove along Nairobi – Mombasa road, at Enterprise road around General Motors area junction, a speeding motor cyclist emerged abruptly from Enterprise road and hit his vehicle on the left side of the cabin. The matter was then reported.

24. In dismissing the appellant's suit this is what the trial court stated at page 108 lines 17-18 to page 109 lines 1-5

> " As per the evidence of the plaintiff, he was on Enterprise road. PW2 changed the narrative and told the court that the plaintiff was from Airtel road. I find that PW2 was not truthful. It is clear that the plaintiff was joining Mombasa road. He failed to give way as a result of which the accident happened. In fact, the police blamed the motor cycle KMDG 408L. I equally blame the plaintiff. He is 100% to blame for the accident".

25. The trial court dismissed PW2 as an untruthful witness because he changed his story as to where the appellant came from before joining Mombasa road. That, left the court with the evidence of the appellant and DW1. It was the appellant's evidence that DW1 was speeding before knocking him. On the other hand, DW1 testified that he was doing 20km per hour when the accident occurred. To him it was the appellant who was speeding from Enterprise road and hit his vehicle, on the left side.

26. The above is the evidence the trial court had to analyze. Both the appellant and DW1 confirmed that the appellant emerged from Enterprise road and joined Mombasa road.

27. In addressing the issue as to whether the trial Magistrate's finding on liability was an error I will refer to the case of *Farah v Lento Agencies* [2006] I KLR 124, 125 where 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".
>
> Also see *Michael Hubert v David Seroney & 5 others* [2009] eKLR

28. The police abstract (P.EXB 1) only mentioned that the appellant was to blame for the accident. What is it that he did that caused the accident? The officer who investigated the accident nor any other officer from the police station testified. It must be appreciated that both the appellant and DW1 were road users and they owed each other and other road users a duty of care while using the road. If indeed DW1 was driving his vehicle at 20km per hour as claimed what did he do to avoid the accident? He stated that it was the appellant who knocked his vehicle on the left side. Besides his word of mouth no photos of this vehicle was availed.

29. On the other hand, the appellant claimed to have been hit from behind by the trailer. So, who between the two (Appellant and DW1) truthfully explained to court what happened? Without the evidence from the police the court would not know whether the trailer was hit on the left side or whether the trailer hit the motorbike on the behind. Such evidence would have also confirmed the point of impact. The mere fact that PW2 was found not to be a truthful witness was not sufficient ground for the trial court to dismiss the suit since PW2 was not the one who had filed the claim.

30. The degree of the injuries inflicted on the appellant attest to the fact that a lot of force was exerted on him. This force could only have come from the speeding vehicle which was driven by DW1. In the circumstances of this case I find that both the appellant and DW1 did not exercise due care while using the road. I therefore apportion liability in the ratio of 50:50 to each of them.

Issue No. (ii) Whether the trial court's proposed assessment of Damages is Fair.

31. The report from Kenyatta National Hospital (page 61) shows that the appellant had a compound fracture on the right femur. His right thigh was deformed. He lay in hospital from 15th March 2015 – 29th April, 2015. The report by Dr. Wandugu dated 1st November, 2016 – (at page 19) reveals that there were implants in the right leg which caused a lot of pain. The said leg had shortened by 1cm. He found the appellant to have suffered functional disability assessed at about 50%. From these reports and the appellant's evidence it is clear that life for the appellant will never be the same again.

32. Counsel for the respondent while relying on the cases of Paul Kithinji Kirimi (*supra*); Bernard Musuu John (supra); Mwavita Jonathan (supra) urged the court to consider an award of Ksh 500,000/= as adequate compensation. On the other hand, counsel for the appellant asked for an award of Ksh 3,000,000/= based on the decision in *Gabriel Mwashuma* (*supra*).

33. I have considered all these decisions cited. The plaintiff in the Gabriel Mwashuma case (supra) suffered more serious injuries than the appellant herein. All the same the appellant also suffered serious injuries. I have also considered other cases among them:

    i. *James Gathirwa Ngungi v Multiple Hauliers (EA) Ltd* [2015] eKLR where the plaintiff was awarded Ksh 1,500,000/= after sustaining compound fractures, of the right tibia, right fibula, fracture of the left ulna and right leg and head injury among others.

    ii. *Geoffrey Mwaniki Mwinzi V Ibero (K) Ltd & Another* 2014 eKLR where the plaintiff was awarded Ksh 2,500,000/= after sustaining, extensive fractures of the left tibia, and fibula, soft tissue injuries on the left leg and fracture of the collar bone.

    iii. *Mwaura Muiruri v Suera Flowers Ltd & Another* [2014] eKLR Ksh 1,750,000/= for fractures, compound double fractures of the right upper and lower 1/3 tibia, multiple lacerations on the face, soft tissue injuries on the chest cage.

34. The trial court herein assessed general damages at Ksh 1,000,000/= which I find to be a bit on the lower side. I set it aside and award the appellant Ksh 1,300,000/= as general damages.

35. There was evidence adduced showing that the appellant would require Ksh 250,000/= for future medical expenses. Special damages of Ksh 85,185/= were also proved.

36. The upshot is that the Appeal has merit and is hereby allowed. The order dismissing the suit is hereby set aside and substituted with an order allowing the suit on the following terms:

    i. Liability apportioned in the ratio of 50:50

    ii. General damages – Ksh 1,300,000/= less 50% = Ksh 650,000/=

    iii. Special damages – 85,185/=

    iv. Future medical expenses 250,000/=

    Total = Ksh 985,185/=

37. I enter Judgment for the appellant against the respondent in the sum of Kshs 985,185/= plus costs and interest from the date of the Judgment in the lower court. The appellant will get costs of the appeal.

38. Orders accordingly

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

H. I. ONG'UDI

JUDGE