Nyambura v Outu (Civil Appeal E294 of 2023)
[2024] KEHC 9642 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E294 OF 2023

H NAMISI, J

JULY 26, 2024

BETWEEN

BERNARD CHEGE NYAMBURA ..... APPELLANT

AND

RONALD EVANS OUTU ..... RESPONDENT

(Being an Appeal from judgement by Hon. H. M. Nganga (Mr) Principal Magistrate delivered on 14th March 2022 in Milimani CMMC No. E12543 of 2021)

JUDGMENT

1. This appeal arises from the judgement by Hon. H. M. Nganga (Mr) Principal Magistrate delivered on 14th March 2022 in respect of proceedings filed at the Milimani Chief Magistrate Court following a road traffic accident that occurred on 2nd September 2021. The said accident involved the Appellant's motor vehicle registration KBJ 807Z and the Respondent, who was a pedal cyclist. As a result of the accident, the Respondent instituted proceedings against the Appellant for general damages, special damages of Kshs 3,550/-, costs and interest.

2. The Appellant entered appearance and filed a Statement of Defence, in which the Appellant denied liability and averred that the Respondent the accident was solely and/or substantially as a result of the Respondent's negligence.

3. At the hearing, the Respondent called 3 witnesses. PW1, PC Joseph Wachira of Industrial Police Station testified that the Appellant's motor vehicle was blamed for the accident. He produced the Police Abstract as well as the entry in the Occurrence Book indicating that the motor vehicle was blamed.

4. The Respondent adopted his witness statement as part of his evidence in chief. He produced a bundle of documents which included treatment notes from Afya Centre X-ray Services Ltd, P3 Medical Form,

motor vehicle search and receipts in support of special damages. He testified that the injuries sustained were:

i. Injury on the right leg;

ii. Bruises on left leg

iii. Injury on right shoulder

iv. Pain in the chest

5. PW3, Dr. Naomi Njeri, produced a medical report. She testified that the Respondent suffered pain and soft tissue injuries. The X-rays indicated that the Respondent had fracture of the ribs, which would heal with time.

6. The Appellant did not call any witnesses nor produce any documents.

7. Parties filed their written submissions. The Respondent submitted that they had proved their case to the requisite standard and urged the trial court to find the Appellant 100% liable for the accident. On the issue of quantum, the Respondent prayed for special damages of Kshs 700,000/- as well as special damages of Kshs 3,550/-. The Respondent relied on the cases of *K. B. Sanghani v Lydia Wanjiku Njuguna & Others*, Nairobi HCCA 373 of 2011 and *Easy Coach Ltd v Emily Nyangasi*, Kisumu HCCC No. 20 of 2015.

8. On their part, the Appellant relied on the cases of *Farida Kimotho v Ernest Maina*, HCCA No. 3720 of 1995 and *Mount Elgon Hardware Ltd v United Millers* CA (KSM) 19 of 1996 in submitting that no liability can attach to the Defendant. On the issue of quantum, the Appellant submitted that an award of Kshs 300,000/- would be sufficient.

9. In its judgment, the trial court observed that the failure of the Appellant to call any witness to contradict the Respondent's testimony did not mean that the Respondent's testimony should be taken as the wholesome truth. The Respondent still had an obligation to prove his case on a balance of probabilities.

10. The trial court held that in consideration of all the evidence and testimony rendered, the Respondent had proven his case on a balance of probability and found the Appellant to be 100% liable for the accident. Further, the trial court awarded Kshs 600,000/- for general damages, Kshs 3,550/- for special damages, costs and interest at court rates payable from the date of judgement.

11. The Appellant, being dissatisfied by the judgement filed a Memorandum of Appeal dated 13th April 2023 on the following grounds:

i. That the learned Magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and fact;

ii. That the learned Magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice;

iii. That the learned Magistrate erred in law and in fact in awarding an award on liability inconsistent with facts pleaded and proved;

iv. That the learned Magistrate erred in law and in fact in finding the Appellant 100% liable as he disregarded the evidence submitted by the Appellant;

v. That the learned Magistrate having misapprehended and misunderstood the points of fact and point of law erred in law and in fact in relying on authorities which were irrelevant and this arrived at an award that is so manifestly high as to be erroneous;

vi. That the learned Magistrate erred in assessing an award which was inordinately high and a wholly erroneous estimate against damages suffered by the Claimant, he erred in law and in fact in awarding under the head of general damages for pain and suffering at Kshs 600,000/- the same based on wrong principles of law was excessively high and unjust and not based on any logical conclusion.

vii. That the learned Magistrate erred in awarding an excessive sum of the injuries suffered in the face of the evidenced adduced and submissions made by the Appellant's counsel on quantum;

viii. The learned Magistrate erred in awarding costs of the suit and interest to the Claimant;

12. Parties canvassed the appeal by way of written submissions. The Respondent filed written submissions dated 6th June 2024. By the time of writing this judgement, the Appellant had not filed any submissions.

13. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the Respondent. The issues for determination in this appeal can be summarised as quantum and liability.

Analysis

14. This being a first appeal, the court relies on the principles set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

> " ..... 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 into account of particular circumstances or probabilities materially to estimate the evidence."

15. In the case of *Bundi Murube v Joseph Omkuba Nyamuro* [1982 – 88]1 KAR 108, the Court stated thus:

> " However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did."

And also, in *Rahima Tayabb & Another v Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -

> " An appellant Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

16. With respect to liability, in the case of *Stapley v Gypsum Mines Limited* (2) (1953) AC 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. One may find that a matte of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."

17. It was not disputed that an accident occurred involving the Appellant's motor vehicle and the Respondent, which was evidenced in the Police Abstract. From the impugned judgement, the trial court had to decide on a balance of probabilities who between the Appellant and Respondent caused the accident. Under the *Evidence Act*, the onus was the Respondent to present admissible evidence for the trial court to give judgement in his favor to support a claim of negligence on the part of the Appellant. To this end, the Police Officer (PW1) presented uncontroverted evidence that the Appellant was to blame for the accident. In this instance, the trial court did not have any other evidence to consider save for the evidence presented by the Respondent.

18. In the cases of *Embu Road Services v Riimi* (1968) EA 22 and 25, *Mzuri Muhhidin v Nazzar Bin Seif* (1961) EA 201, *Menezes Stylianicers Ltd* CA No. 46 of 1962 the courts held inter alia; -

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

19. Once the Respondent had discharged his burden of proof, the burden then shifted to the Appellant. The Appellant did not adduce any evidence to discharge his burden, thus leading to the finding by the trial court on the issue of liability. I see no reason to interfere with this finding.

20. On quantum of damages, the circumstances in which this court can upset the award of damages made by the trial court have been laid down in the case of *Mbogo & Another v Shah* (1968) EA where it was held;

> "…. this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly, wrong, because it has misdirected itself or because it has acted on matters which it should not have taken into consideration and in doing so, arrived at a wrong conclusion".

21. From the Reports by Afya Centre X-Ray Services Ltd and Dr. Elizabeth Kimunguyi, the Respondent suffered fractures of the 4th, 5th and 6th right posterior ribs, injury to the left shoulder and pain in the left knee. He was treated at Rhodes Health Centre and discharged on medication. Dr. Kimunguyi's opinion and prognosis was that he suffered maim, sustaining soft tissue injuries of mild severity which caused him pain and suffering.

22. As stated above, trial court's discretion in assessing general damages will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high or inordinately low that it must be wholly erroneous. It is trite that an award of damages is not meant to enrich the victim but to compensate them for the injuries sustained.

23. In the case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR, the Court of Appeal held that:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

24. In arriving at Kshs 600,000/- as the award for general damages, the trial court relied on several authorities. In *Morris Miriti v Nahashon Muriuki & Another* [2018] eKLR, the plaintiff sustained the following injuries: tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and facture of the right scapula. The court awarded Kshs 300,000/=.

25. In *West Kenya Sugar Company Ltd v David Luka Shirandula* [2017] eKLR, the plaintiff suffered fractures of 2 ribs on the right side, blunt injury to the right thigh, blunt injury to the right ankle, bruises to both elbows and blunt injury to the right knee. The court awarded Kshs 180,000/-.

26. In *Bolpak Trading Co Ltd & Another v Gilbert Onyango Odie* [2022] eKLR, the plaintiff suffered 7th right rib fracture, 8th right rib fracture, chest contusion, bruises on the face, blunt trauma to the lower back, right knee and left hand. The court awarded Kshs 250,000/-.

27. In the case of *Kensilver Express Ltd v Nzangu* [2022] KEHC 1033 (KLR), the plaintiff suffered cut wound on the right ear, two rib fractures and severe chest pain. The court replaced an award of Kshs 800,000/- for general damages with an award of Kshs 500,000/=.

28. I rely on the case of *Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020] eKLR, the court therein set aside an award of Kshs 650,000/- and replaced the same with a sum of Kshs 400,000/- for general damages where the respondent had sustained bruises on the scalp, neck, abdomen, lower back, cut wound on the left thumb, left palm and left foot near ankle joint, sublaxation of the left shoulder join and fractures of 3rd and 9th ribs.

29. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar, I am of the considered view that a sum of Kshs 500,000/- is reasonable.

30. The upshot is that the appeal on quantum succeeds. The judgement of the trial court on general damages in the sum of Kshs 600,000/- is set aside and in its place an award of Kshs 500,000/- is made.

31. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform In the presence of:-

Kabita for the Appellant

Ms. Akasi for the Respondent