Nyoro & another v Thande (Civil Appeal E438 of 2022)
[2024] KEHC 9059 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9059 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E438 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

BENJAMIN NYORO ..... 1ST APPELLANT

VINCENT MACHARIA NJOROGE ..... 2ND APPELLANT

AND

GEORGE MWANGI THANDE ..... RESPONDENT

(Being an appeal from the Judgment of Hon. M. W Murage Senior Resident Magistrate in Nairobi CMCC No. 5183 of 2019, delivered on 24th May, 2022)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Resident Magistrate's Civil Suit No. 5183 of 2019. In the said suit, the respondent (who was the plaintiff) sued the appellants (who were the defendants) for both general and special damages arising from a road traffic accident in which he sustained serious bodily injuries and damages.

2. The 1st appellant was the driver of the motor vehicle registration number KAV 410J Nissan Matatu which knocked down the respondent along Waiyaki Way at N-market. It was owned by the 2nd appellant. The claim was fully defended and the trial Magistrate in her Judgment found the appellants 100% liable for the accident. She awarded the respondent Ksh 500,000/= as general damages and special damages at kshs.278,550/= plus costs of the suit together with interest.

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

i. That the Learned Magistrate erred in law and in fact by failing to consider the applicable principles in assessment of liability, and consequently assessing liability at 100% as against the Defendants, despite the overwhelming evidence presented to the contrary.

ii. That the learned trial magistrate erred in law by failing to consider the applicable principle in assessment of damages in personal injury claims thus occasioning miscarriage of justice.

iii. That the learned trial magistrate erred in law by failing to consider awards or already decided authorities with comparable injuries, consequently awarding manifestly excessive general damages.

4. The appeal was canvassed through written submissions.

Appellant's submissions

5. These were filed by Kimondo Gachoka & Company Advocates and are dated 10th November, 2023. Counsel submitted on both liability and quantum.

6. On liability counsel made reference to the evidence of PW1, PW2, PW3 and DW1 and submitted that the trial Magistrate's finding on liability ought to be dismissed since the respondent failed to prove his case on a balance of probabilities. He placed reliance on section 107 of the *Evidence Act* and the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 KLR.

7. On quantum, he submitted that the P3 form dated 3/12/2018 and the medical report from Kinoo Medical Clinic dated 20/5/2019 listed the same injuries as those that are in the plaint. That in the medical report of Dr. L. W. Okombo, the injuries sustained by the respondent were soft tissue injuries. However, the original treatment notes from St. Peter's Orthopedic and Surgical Centre dated 26/12/2018 listed fracture of the tibia as the injury sustained by the respondent.

8. Counsel submitted further that it was clear the respondent sustained a tibia fracture. That the lower court awarded Kshs. 278, 550.00 as special damages and Kshs. 500,000.00 as general damages. That this was inordinately high considering the nature of injuries sustained by the respondent. He proposed an award of kshs. 80,000/= which would have been sufficient.

9. On the award for general damages counsel urged the court to be guided by the following cases;

i. *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR, where Kshs. 400,000/= was awarded to the plaintiff with compound fractures of the tibia/ fibula bones on the right leg, deep cut wound and tissue damage on the right leg, blunt chest injury and head injury with cut wound on the nose.

ii. *Rayan Investments Limited v Jeremiah Mwakulegwa Kasha* [2017] eKLR, where the court awarded the claimant a sum of Kshs. 300,000/= as general damages for a fracture of the right fibula, severe blunt trauma on the left; ankle joint, bruises on the right elbow and blunt trauma on the right wrist.

iii. *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR, where the respondent was awarded a sum of Kshs. 450,000/= in general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/ fibula, segmental distal fracture of the right femur.

10. Counsel concluded his submissions by urging the court to allow the appeal and award the appellants costs of the suit based on the provisions of section 27 (1) of the *Civil Procedure Act*.

Respondent's submissions

11. These were filed by Shem Kebongo Advocates and are dated 27th October, 2023. Counsel gave a background of the case and submitted on liability and quantum.

12. On liability he made reference to the evidence of PW1 and PW3, and submitted that their testimonies articulated well on how the accident occurred and that the respondent was a pedestrian beside the road. Further, that the allegations that the respondent was drunk and had jumped into the road were not substantiated with any medical or police records. He added that the appellants had not disputed in the proceedings or in their submissions the occurrence of the accident and the respondent had proved negligence on the appellants' part.

13. The court's attention was drawn to the decisions in *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, *Nzoia Sugar Company Limited v David Nalyanya* [2008] eKLR, *Walter Onyango v Foam Mattress Limited* [2009] eKLR, *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 and *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1KLE 526.

14. On quantum, counsel submitted that the award for general damages was reasonable and that the same could only be disturbed upwards. Further, that the testimony by PW2, Dr. George Mwaura confirmed the injuries the respondent sustained which was a fracture of the tibia/fibular bone with 10% degree of permanent incapacity on the limb. He urged the court to be guided by the case of *Francis Ndungu Wambui & 2 Others v VK (a minor suing through next friend and mother* MCWK) [2019] eKLR where the plaintiff was awarded ksh. 1,000,000/= for soft tissue injuries to the upper limbs, compound fracture of the distal tibia and fibula shaft as well as loss of consciousness.

15. In conclusion, counsel placed reliance on the case of *Kemfro Africa Limited t/a Meru Express Services & Another v A. M Lubia & Another* [1985] eKLR and urged the court to dismiss the appeal with costs to the respondents.

Analysis and determination

16. 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 conclusion.

17. 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 reanalyse 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"

18. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are as follows:

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

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

19. 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 stated

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in *Stapley V Gypsum Mines Ltd* (2) (1953) A.C 663 at pg 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 .....
>
> " 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".

20. 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".

21. Guided by the above cited authorities it is my view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. 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.

22. This court has considered the evidence adduced before the trial court. It is not in dispute that the 1st appellant was the driver of motor vehicle registration number KAV 410J which knocked down the respondent as a result of which he sustained injuries and suffered loss. The motor vehicle belonged to the 2nd appellant. During trial the respondent called three witnesses and he testified as PW1 and informed the court that he held his head while crossing the road at a zebra-crossing when a matatu hit him. He was from the right to the left heading to Nairobi and had finished crossing.

23. PW3 No. 57558 Corporal Wilfred Nyabuti attached to Kabete police station produced the police abstract (PEXH 4b) and informed the court that the case was under investigations. On cross examination, he confirmed that he was not the investigating officer and that he did not visit the scene.

24. The appellants called two witnesses, DW 1 No. 66266 PC Kennedy Gitonga attached to Kabete Police station. He produced the police abstract and OB (DEXH 1a & 1b) and informed the court that the respondent was to blame for the accident as he had jumped over the wall dividing the two lanes. On cross examination, he informed the court that he was attached to the same station as PW3 and that the case was pending investigation at the time the abtract was issued.

25. The 1st appellant testified as DW2. He told the court that he hit someone while driving on 3/12/2018. He testified further that it was dark but he could not see in front and he was driving at a speed of 50km/h. He added that the pedestrian jumped the wall, was drunk and he(1st appellant) was charged thereafter.

26. The trial court in its judgment faulted the 1st appellant for failing to drive carefully and for not being mindful of other road users. She noted that the 1st appellant would not have been charged if he was not to blame for the accident. She relied on the testimony of the respondent which was corroborated by PW3's and DW3's evidence and found the 1st appellant 100% liable for the accident.

27. After analysing all the evidence above, this court notes that it is not in dispute that the respondent was knocked down by the 2nd appellant's motor vehicle which was driven by the 1st appellant. The question that arises is who was to blame for the said accident? Both the 1st appellant and respondent claimed not have caused the accident. The 1st appellant (DW2) admitted to have seen the respondent who was drunk jump over the wall separating the two lanes. DW1 (police officer) also blamed the respondent for the accident for the same reason.

28. The respondent (PW2) on his part testified that he was hit while crossing the road at a zebra crossing This court notes further that PW3 and DW1 produced similar police abstracts and they informed the court that investigations were underway but no police investigations report was produced in court as evidence of the same. The 1st appellant however told the court that he had been charged.

29. In view of the forgoing, it is my opinion that the respondent's evidence did not prove on a balance of probability (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. However, the 1st appellant admits to have seen the respondent jump over the wall and that it was possible for him to hold the brakes since he was driving at 50Km/h but he failed to do so. Further, the claim by the DW2 a police officer that the respondent was to blame was not substantiated.

30. In his evidence in chief the respondent informed the court that he held his head while crossing the road. Why was he holding his head while crossing the busy highway? He too contributed to the accident. In addition, none of the parties herein presented any evidence to show that they were not liable. There were gaping holes herein.

31. Consequently, this court finds that the decision by the trial magistrate finding the appellants 100% liable was erroneous and therefore the same is set aside and substituted with the ratio of 75:25 in favour of the respondent.

32. On the issue as to whether the award on general damages was inordinately high.

33. 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."

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

> " comparable injuries should attract comparable awards".

35. In assessing quantum, the trial Magistrate considered the injuries sustained by the respondent and confirmed by two doctors. (PW2 and DW3). From the pleadings, and the material on record the respondent mainly suffered a fracture of the left tibia/fibular. The trial court further considered the authorities relied on by the respondent and went ahead to award general damages amounting to kshs. 500,000/=. This court could not trace the lower court written submissions by the appellants in the record of appeal.

36. I have considered the award of Kshs. 500,000/= made by the trial magistrate based on authorities cited by the respondent in their submissions before that court. I have looked at the cases relied on by both parties in the lower court and on Appeal. In the authorities relied on by the appellants on appeal the plaintiffs therein were awarded kshs. 400,000/=, kshs.300,000/= and kshs. 450,000/= respectively for injuries similar to those sustained by the respondent herein.

37. On his part, the respondent requested for an award of Kshs. 1,500,000/= in the trial court but the authorities he relied on as quoted in the submissions found at pages 41 to 45 of the record of appeal do not indicate the injuries sustained by the plaintiffs therein. On appeal, he relied on the case of Francis Ndungu Wambui & Another v VK (minor) where the plaintiff therein was awarded Kshs. 1,000,000/= for injuries similar to his.

38. Having observed as above it is my considered view that the authorities relied on by the appellants in a way justifies the award by the magistrate. The plaintiffs therein sustained injuries comparable to those of the respondent and awards ranging from kshs. 300,000/= to Kshs. 450,000/= made which is not far from the Kshs. 500,000/= by the trial Magistrate.

39. In view of the foregoing, it is my opinion that the award of kshs.500,000/= by the trial Magistrate was not inordinately high. It will be retained but less 25% contribution = Ksh 375,000/=

40. The award on special damages for Kshs.278,550/= was not challenged.

41. The upshot is that the appeal partially succeeds. The lower court Judgment is hereby set aside. I enter Judgment for the respondent in the sum of Ksh 653,550/= (six hundred & fifty-three thousand five hundred and fifty shilling) plus interest and costs from the date of Judgment in the subordinate court.

(b) Each party to bear its own costs of the appeal.

40. Orders accordingly

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

H. I. ONG'UDI

JUDGE