Kagwi v Gitau (Civil Appeal 21 of 2023)
[2024] KEHC 10408 (KLR) (22 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10408 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 21 OF 2023

FN MUCHEMI, J

AUGUST 22, 2024

BETWEEN

GICHINI KAGWI ..... APPELLANT

AND

GILBERT WAINAINA GITAU ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. C. K. Kisiangani (SRM) delivered on 23rd June 2022 in Ruiru SPMCC No. E163 of 2021)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Senior Resident Magistrate in Ruiru SPMCC No. E163 of 2021 a claim arising from a road traffic accident whereby the trial court apportioned liability between the appellant and the respondent at the ratio of 80:20 respectively. The respondent was awarded general damages of Kshs. 750,000/- for pain, suffering and loss of amenities, special damages of Kshs. 109,350/- and costs.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in apportioning 80% liability to the appellant when the respondent was to blame for the accident for attempting to board a motor vehicle while it was not safe to do so.

    b. The learned trial magistrate erred in law and in fact in awarding Kshs. 750,000/- as general damages and special damages of Kshs. 109,350/-.

3. Directions were issued that the appeal be canvassed by way of written submissions and from the record only the respondent complied by filing his submissions on 12th July 2024.

The Respondent's Submissions

4. The respondent relies on the case of Civil Appeal No. 58 of 2022, Kyoga Hauliers vs Okoddi and submits that the trial court exercised its discretion judiciously and there is no need to interfere with the award of Kshs. 750,000/- in general damages and Kshs. 109,350/- in special damages. Further, the respondent submits that he specifically pleaded the award on special damages and proved the same. To support his contentions, the respondent relies on the cases of Mariam Maghema Ali vs Jackson M. Nyambu t/a Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban vs City Council of Nairobi 1982-1988 1 KAR 681.

5. The respondent submits that from the medical report by Prof. Kiama Wangai dated 16th March 2021, he sustained the following injuries:- laceration and abrasion both upper limbs, compound fracture right femur, fractures right tibia and pains, and multiple soft tissue injuries. Discharge summaries from Thika Level 5 hospital, Carritas Community Hospital Thika, X ray films, X ray reports and P3 Form dated 4th February 2021 were produced in evidence. The respondent further submits that Prof Kiama indicated in his report that he suffered grievous harm and assessed the respondent's disability at 15%. On cross examination, Prof Kiama indicated that the basis of his assessment of the injuries at 15% disability was clinical. He indicated that due to the compound fracture of the respondent's right leg, it would never be the same again and he would never get a full recovery. Notably, the appellant did not successfully controvert the issue of disability.

6. The respondent relies on the case of Michael Njagi Karimi vs Gideon Ndungu Nguribu & Another [2013] eKLR and submits that trial magistrate rightly awarded damages commensurate to the injuries he sustained since the trial magistrate considered the authorities cited by the respondent and which authorities addressed similar injuries.

7. The respondent further relies on the case of Susan Kanini Mwangangi & Another vs Patrick Mbithi Kavita [2019] eKLR and submits that the doctrine of res ipsa loquitor requires one to have discharged their burden of proof in order to escape liability, thereby shifting the burden to the defending party, which the respondent did during trial.

Issues for determination

8. The main issues for determination are:-

    a. Whether the liability apportioned by the trial court was against the weight of the evidence adduced.

    b. Whether the award of general damages was inordinately high.

    c. Whether the award on special damages was specifically pleaded and proved.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs 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."

10. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the liability apportioned by the trial court was against the weight of the evidence adduced

12. The appellant seeks to have the court substitute the trial court's findings of 80% liability against him in favour of the respondent with 100% liability. He argued that the respondent was fully blame for the accident for attempting to board a motor vehicle while it was not safe to do so.

13. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

14. According to the respondent, on 14th August 2020 he was involved in a road traffic accident at Githurai round about along Thika road where motor vehicle registration number KCH 519N swerved off its lane and hit him. He further testified that he was on the stage waiting to board a motor vehicle to Nairobi when the suit motor vehicle went and hit him at the stage where he was standing. The respondent testified that the suit motor vehicle knocked him down but did not go over him. The respondent called a police officer, Corporal Samuel Karimi who testified as PW2 and stated that on the material day, an accident occurred between the respondent as a lawful pedestrian and motor vehicle registration number KCH 519N. The witness further testified that the motor vehicle knocked down the respondent who sustained injuries. On cross examination, the witness stated that the respondent was hit by the bus and he fell on the pavement. He further testified that the motor vehicle did not run the respondent over because if it did, his leg would have been crushed. The witness further testified that the respondent ran after the motor vehicle to hang on the door but missed the step and fell.

15. The appellant called the driver of motor vehicle registration number KCH 519N Isuzu bus who testified that on the material day he was driving the motor vehicle registration number KCH 519 N from Nairobi heading to Githurai round about where he turned at Githurai round about and all the passengers who were to alight that stage did so. He then proceeded with his journey to Nairobi when the respondent jumped on the suit motor vehicle and hang on the doorstep but the door was closed so he missed the step at the door and fell down. The witness further testified that the motor vehicle run over the respondent by the left side rear tyre injuring the respondent.

16. The appellant further called a police officer PC Maurice Okoth as DW2 who testified that on the material day, an accident occurred between the respondent and motor vehicle registration number KCH 519N. DW2 produced a police abstract and testified that from the OB, the investigating officer indicated that the respondent was trying to hang on the door of the suit motor vehicle when he missed the handle and fell where he was run over by the vehicle.

17. From the record, it is clear that the only parties who witnessed the accident are the respondent and the driver of the appellant's motor vehicle. Although the respondent testified that he was on the stage awaiting to board a motor vehicle heading to Nairobi, he did not tell the court whether he tried to avoid the accident for instance moving away from the stage as the motor vehicle approached him at the stage. The respondent only testified that he did not see the motor vehicle approaching him. Furthermore, the appellant testified that the respondent jumped on the vehicle and since the door was closed, he missed the handle and fell and therefore the motor vehicle ran over him to the effect that the respondent contributed to the accident. The appellant did not call any evidence to corroborate his testimony. However, the respondent called the police officer PW2 who corroborated his evidence. From the nature of injuries sustained, the testimony of the appellant of the motor vehicle running over the respondent was not sustainable.

18. Having analysed the evidence on record, I am of the considered view that the accident did occur and that the evidence of the respondent was credible on how the accident occurred. The respondent had a duty to ensure that he was on the look out with a view of avoiding the accident. As for the appellant, he had the duty to other road users as he drove off to the stage. The appellant who was driving off the bus stage and ought to have exercised due care to avoid hitting pedestrians at the stage. The respondent failed to exercise due diligence to an extent as was assessed by the learned magistrate. I am of the considered view that the apportionment of liability at 80:20 ration was based on the evidence on record. For these reasons, I find no reason to interfere with the magistrate's finding on liability.

Whether the award of general damages was inordinately high.

19. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele 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 awarded different figure if it had tried the case at first instance. The appellant 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."

20. Similarly, in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

21. According to the plaint, the respondent suffered the following injuries:-

    a. Laceration and abrasion both upper limbs.

    b. Compound fracture right fermur.

    c. Fractures right tibia.

    d. Pains and multiple soft tissue injuries.

22. The trial magistrate awarded a sum of Kshs. 750,000/- for general damages for pain and suffering. The appellant states the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

23. The record shows that the injuries sustained by the respondent were confirmed by Prof. Kiama Wangai in his medical report dated 16th March 2021. The doctor classified the respondent's injuries as grievous harm and assessed the degree of permanent incapacitation as 15%.

24. Looking at the decisions relied on by the respondent and those relied on by the appellant in the trial court it is notable that the decisions cited by both parties have more severe injuries than those that were sustained by the respondent. In comparison, the cases cited by the appellant are near comparable to the injuries sustained by the respondent but the degree of incapacitation was set much higher than those cases that sustained by the respondent

25. I have considered the injuries suffered by the respondent suffered serious injuries and especially the compound fracture on the right femur and the fracture of the right tibia. In my considered view, the magistrate arriving at the award of Kshs. 750,000/- took into account the severity of the injuries, the current inflation trends and the fact that similar injuries must be awarded similar compensation. As such, I am of the view that the award of general damages was commensurate with the injuries suffered by the respondent, I find no reason to interfere with the said award.

Whether the award on special damages was specifically pleaded and proved.

26. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

> Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may

not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

27. The respondent in his plaint dated 26th March 2021 pleaded for special damages for the sum of Kshs. 109,350/- which consisted of medical report of Kshs. 2,500/-, motor vehicle copy of records Kshs. 550/- and medical expenses Kshs. 106,300/-. The respondent produced receipts in respect of the medical report of Kshs. 2,500/-, the motor vehicle copy of records of Kshs. 550/- and medical expenses at Kshs. 106,300/-. Thus, the respondent pleaded and proved his claim on special damages.

Conclusion

28. Consequently, I find this appeal lacking merit and I hereby dismiss it with costs to the respondent.

29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE