Nyoike v Mwatemu (Civil Appeal 78 of 2023)
[2024] KEHC 10414 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10414 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 78 OF 2023

FN MUCHEMI, J

AUGUST 21, 2024

BETWEEN

EVANSON MUNGAI NYOIKE ..... APPELLANT

AND

PETER MWOLOLO MWATEMU ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. O. Wanyaga (SRM) delivered on 28th September 2022 in Thika CMCC No. 614 of 2010)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. 614 of 2010 in a claim arising from a road traffic accident whereby the court found the appellant 100% liable and awarded the respondent general damages of Kshs. 1,500,000/- for pain, suffering and loss of amenities as well as future medical expenses of Kshs. 300,000/-, special damages of Kshs. 550/- 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 the apportionment of liability contrary to the evidence adduced in court.

    b. The learned trial magistrate erred in law and in fact in warding damages that were inordinately high and not in line with comparable awards made in respect of similar injuries.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on the cases of Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR and Christine Kalama vs Jane Wanja Njeru & Another [2021] eKLR and submits that the respondent did not prove the requirements of the tort of negligence. The appellant submits that the respondent exposed himself onto harm's way as the trucks were moving one at a time receiving loads The trucks were on the side of the road moving slowly as they are required as the respondent stood right onto the truck's path. The appellant argues that the respondent did not try to mitigate or avoid exposing himself to danger as there was no caution exercised even after he hooted to alert the respondent to give way.

5. The appellant submits that whenever a truck or any motor vehicle jerks forward, the vehicle cannot move a long distance before the driver gains control of the jerked vehicle. Therefore, the appellant argues that the respondent was standing so close to a large moving truck that he was hit and thereby resulting to his injuries.

6. Relying on the case of Michael Kariuki Muhu vs Charles Wachira Kariuki & Another [2015] eKLR, the appellant submits that he did everything within his control to avoid hitting the respondent and as such, he was not negligent. The appellant further submits that the learned trial magistrate disregarded vital evidence he produced and that the respondent failed to prove his case on a balance of probabilities.

7. The appellant further relies on the case of *Simba vs Langat (Civil Appeal 84 of 2021)* [2024] KEHC 2110 (KLR) (29 February 2024) (Judgment) and urges the court to find the respondent and himself equally liable for the accident.

8. The appellant submits that the learned trial magistrate erred in law and in fact in adopting the wrong principles as he assessed general damages considering the injuries sustained by the respondent. Relying on the cases of Joseph Wambura vs Joseph Mwangi Obai [2018] eKLR; Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] eKLR and Osman Mohammed & Another vs Saluro Bundit Mohammed Civil Appeal No. 30 of 1997, the appellant submits that the award by the trial court is inordinately high and urges this court to review and set aside which is inordinately high in the circumstances.

9. The appellant submits that Kshs. 550,000/- is reasonable and would adequately compensate the respondent considering the nature of his injuries. The appellant relies on the case of Mwavita Jonathan vs Silivia Onunga [2017] eKLR where the plaintiff suffered fractures on the hip joint with corrective surgery involving insertion of surgical implants and screws and the court awarded Kshs. 400,000/-. Further in David Kimathi Kaburu vs Dionisius Mburugu Itirai [2017] eKLR the court awarded Kshs. 630,000/- where the plaintiff sustained dislocation of the right hip joint and fracture of the right femur bone which injuries were more serious than those suffered by the plaintiff.

10. The appellant argues that the learned trial magistrate erred in law and in fact in awarding future medical expenses. The appellant submits that parties are bound by their pleadings and future medical expenses are specific damages. The medical report by Dr. Wokabi from Protection Surgical Clinic dated 4th April 2022 provided that the future medical expense for removal of the implant would cost Kshs. 80,000/-. As such, the appellant prays that the court reduce the award made by the trial court and substitute it with the figure proposed by the doctor. Further, the respondent during trial testified that he did not follow up and/or seek further medical treatment and therefore since he did not take appropriate measures to ensure speedy recovery by accepting medical attention, he should receive less compensation for his injury.

The Respondent's Submissions

11. The respondent submits that the accident occurred on 7th April 2017 when he was a lawful pedestrian and the appellant's motor vehicle regsitartion number KZW 218 violently hit him as a result of which he sustained serious bodily injuries. The respondent submits that although the appellant claimed that he hooted to alert him, nowhere in the appellant's testimony was that brought up. Further, the appellant alleges that the lorry jerked but the circumstances under which that happened are not explained. It was the driver who was controlling the impugned motor vehicle at the time when it was set in motion and injured the respondent. Further, the appellant did not demonstrate what actions he took to avoid hitting the respondent.

12. The respondent submits that it is not disputed that he was injured. The driver of the impugned motor vehicle expressly admitted that the respondent was injured and that the driver of the vehicle took him to hospital. The respondent further submits that the injuries suffered were extensive and the appellant cannot seek refuge in application of logic and practicality in claiming that he was close in proximity to the vehicle.

13. The respondent testified in the court below that the impugned vehicle went off the road and knocked him down. The court correctly appreciated that fact and held the appellant vicariously liable.

14. The respondent submits that he sought for general damages of Kshs. 3,500,000/- for pain, suffering and future lost earning capacity but the court below awarded Kshs. 1,500,000/-.

15. On the award of future medical expenses, the respondent submits that he relied on the medical report from Machakos Level 5 Hospital which gave a prognosis to the effect that he would require further surgery to reconstruct his right knee to improve mobility of his right leg at an estimated cost of Kshs. 300,000/-. The medical report was prepared on 2nd February 2020 and the respondent submits that it was very specific on what the future costs would entail. Thus, the respondent submits that the appellant has failed to adduce sufficient grounds to warrant this court to disturb the reasonable awards made by the magistrate.

Issues for determination

16. The main issues for determination are:-

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

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

    c. Whether damages for future medical expenses was properly awarded.

The Law

17. 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."

18. 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.

19. 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.

20. The appellant seeks to have the court substitute the trial court's findings of 100% liability with equal liability between the respondent and himself. The appellant asserts that the trial court erred in finding him solely liable after his witness and himself presented evidence to show that the respondent was equally liable as he put himself in the way of danger and did nothing to avoid the accident.

21. The principles guiding the appellate court's power to interfere with the 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.

22. The respondent said that on 7th April 2020 he was on the side of the road at Juja flyover near Swinkell Mall when the driver of motor vehicle registration number KZW 218 veered off the road and knocked him down. The respondent called a police officer as PW1 as a witness. He testified that an accident occurred on 7th April 2020 between the respondent as a pedestrian and motor vehicle registration number KZW 218 on Thika Nairobi service lane at Juja. The witness testified that the subject motor vehicle developed a mechanical hitch and the driver lost control of the same. It veered off the road and hit the respondent who was walking on the roadside of the left side. PW1 testified that PC Robert Muiti investigated the accident after visiting the scene and found that motor vehicle registration number KZW 218 was to blame.

23. The appellant testified as DW1 as the registered owner of motor vehicle registration number KZW 218 but did not give an account of how the accident occurred as he did not witness the same. DW1 called his driver as DW2 who was driving on the material day and he testified that he was parked on

the roadside along the service lane at Juja in a queue awaiting to receive an order to supply building materials to clients. He further testified that the lorry in front of him had just left the queue and his was next in the queue.

As he attempted to start his vehicle so that he could move it a few inches in front to create space for another lorry to join the queue at the back, his lorry jerked and hit the respondent who was standing in front of the lorry. The witness further testified that despite his attempts to hoot at the respondent to get out of the looming danger, he stood still thereby occasioning the accident.

24. From the record, it is clear that the driver of the suit motor vehicle admitted that the lorry jerked and hit the respondent. This fact is supported by the respondent's evidence in that he stated that he was at the roadside and the suit motor vehicle hit him occasioning him serious injuries. PW1 testified that PC Robert Muiti visited the scene and investigated the accident and reached the conclusion that the motor vehicle registration number KCW 218 was to blame. The appellant has argued that the respondent is to equally blame for the accident as he was in the line of danger and did nothing to prevent the accident. The appellant did not provide any evidence to support that the allegation. The driver was clear that the motor vehicle jerked and hit the respondent. As such, it is my considered view that no evidence has been presented by the appellant to show that the learned trial magistrate applied his discretion wrongly in holding that the appellant was wholly liable for the accident in negligence and breach of the duty of care.

Whether the award of general damages was inordinately high.

25. 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."

26. 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."

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

    a. Blunt injury on the right thigh.

b. Fracture of the right femur which has healed with permanent deformity of the right knee of 40% total bodily incapacity.

28. The magistrate awarded a sum of Kshs. 1,500,000/- for general damages for pain and suffering. The appellant submits that 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.

29. The record of appeal shows that the injuries sustained by the respondent were confirmed by Dr. John Mutunga in his medical report dated 2nd February 2020. The doctor further indicated that the respondent suffered severe skeletal injuries and healing took place but with deformity of the right knee. The doctor further assessed the degree of permanent incapacitation as 40%.

30. I have perused the submissions of the parties. It is evident that the decisions cited by the appellant contain injuries that are less severe than those the respondent suffered. The decisions the ones cited by the respondent contain injuries that are more severe than the injuries sustained he sustained.

31. In my view the case that is near comparable to the respondent herein are the case of Teresiah Ngugi & Another vs Michael Masia Kimende [2018] eKLR where the respondent sustained mild head injury with facial bruises, blunt chest injury with fractured ribs, cut wound right leg below the knee and compound fracture of the right tibia/fibula.

32. The learned trial magistrate in arriving at the award of Kshs. 1,500,000/- took into account the severity of the injuries, the submissions filed by the parties, the authorities cited and the passage of time since their delivery. Taking into consideration the severity of the respondent's injuries, and the inflationary trends, it is my considered view that Kshs. 1,500,000/- is reasonable compensation for general damages for pain, suffering and loss of amenities. As such, I find no reason to interfere with the award.

Whether damages for future medical expenses was properly awarded.

33. The Court of Appeal in the case of Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR stated:-

> We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs Gituma (2004) 1 EA 91, this Court stated:-
>
> > And as regards future medication (physiotherapy) the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as raising naturally from infringement of a person's legal right should be pleaded.
>
> We understand that to mean that once the plaintiff pleads that there would need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where treatment is undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment.

> We think that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

34. The appellant argues that the most recent medical report by Dr. Wokabi from Protection Surgical Clinic dated 4th April 2022 provides that the cost for the removal of the metal implant is Kshs. 80,000/-. He thus urges the court to substitute the award of Kshs. 300,000/- given by the respondent with the sum of Kshs. 80,000.-.

35. From the medical report by Dr. John Mutunga dated 2nd February 2020, the respondent would require to remove the metal implant at a cost of Kshs. 300,000/-. The respondent pleaded for future medical expenses in his plaint and produced the medical report by Dr. John Mutunga from Machakos Level 5 Hospital to support his claim. The respondent testified that he underwent treatment upon being involved in the accident which included surgery. He developed complications after 3 months that necessitated further surgery.

36. The medical report the appellant is relying on is a medical report by Dr. Wokabi which the appellant produced in his list of documents. It appears that no reference was made to the medical report at the time the plaint was drafted and filed. However, the respondent in evidence pleaded produced proof of future medical expenses as shown in the from the doctor's report and in the treatment records. He had been attending hospital for reviews since he was involved in the material accident. Accordingly, it is my considered opinion that the award for future medical expenses was justified and made in consideration of the applicable principles and ought not to be disturbed.

Conclusion

37. Consequently, I find no merit in this appeal and it is hereby dismissed with costs to the respondent.

38. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE