Mathenge & 2 others v Awino (Civil Appeal E079 of 2021)
[2024] KEHC 10092 (KLR) (13 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10092 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E079 OF 2021

GL NZIOKA, J

AUGUST 13, 2024

BETWEEN

JOHN MATHENGE ..... 1ST APPELLANT

DAIMA CONNECTIONS ..... 2ND APPELLANT

EAST AFRICAN INSTITUTE OF CERTIFIED STUDIES LIMITED ..... 3RD APPELLANT

AND

MOSES ODOYO AWINO ..... RESPONDENT

(Being an appeal from the decision of Honourable Y. M. Barasa (SRM) delivered on 2nd December 2021, vide Naivasha CMCC No. 376 of 2019)

JUDGMENT

1. By a plaint dated 24th October, 2018 the plaintiff (herein "the respondent") sued the defendants (herein "the appellants") seeking for judgment against for:
    a. General damages
    b. Special damages; Kshs. 6,550
    c. Cost of the suit
    d. Interest.
    e. Any other relief deemed fit to grant by the Honourable court.
2. The respondent pleaded that on or about 9th February, 2019, he was travelling as a lawful passenger along Nakuru Naivasha road while in the motor vehicle registration No. KCS 278A Isuzu bus driven by the 1st appellant, owned by the 2nd appellant and registered in the name of the 3rd appellant.

3. That upon reaching Jacaranda area the 1st appellant drove the motor vehicle; negligently, recklessly and carelessly at a high speed, without regard to the safety of the passengers and other road users, as a result he lost control his vehicle causing it to collide with an on-coming motor vehicle registration No. KBS 570A.

4. That as a result of the accident the respondent sustained the following injuries: -

    a. Blunt injury to the chest wall leading to fracture of the right clavicle;

    b. Blunt injury to the left shoulder joint leading to soft tissue injuries;

    c. Soft tissue injuries of both knee joints;

    d. Further particulars of injures as furnished at the hearing by way of a medical report.

5. The respondent attributed the cause of the accident to negligence of the 1st appellant and 2nd and 3rd appellants' authorized driver and/or agent for driving the vehicle carelessly, without due care and attention, in a zigzag manner, on the wrong-side of the road, at an excessive speed and failing to slow down, stop, brake, swerve or act in any way to avoid the accident.

6. Further by failing to keep a look out for other road users, to keep a distance or notice motor vehicle registration No. KBS 570A, have regard for other road users and driving a defective motor vehicle.

7. The respondent relied on the provisions of the *Traffic Act*, Highway Code and the doctrine of *res ipsa loquitor*.

8. However, the appellants filed a statement of defence dated; 22nd August 2019 and denied being the owners, in control and/or possession of the subject vehicle. The occurrence of the accident and the particulars of negligence attributed to them as outlined in the plaint were denied and the respondent put on strict proof thereof.

9. However, the appellants averred in the alternative and on a without prejudice basis, that if the accident occurred which is denied, it was caused solely and/or substantially contributed by the negligence of the respondent for failing to take any adequate precaution for his safety, fasten the safety belt provided by the appellants and failing to heed instructions on safety precautions, traffic rules and regulations.

10. Further, in the alternative and on a without prejudice basis, the appellants pleaded that if the accident occurred at all, it was caused solely and/or substantially contributed by the negligence of the driver of motor vehicle registration KBS 570A for failing to keep a proper look out for other road user, failing to stop, swerve slow down or manage the said vehicle to avoid the accident, disregarding traffic rules and regulations. Further for failing to have sufficient regard for the safety of other road users and endangering their lives in the manner of his driving. The appellants relied on the doctrine of volenti non-fit injuria.

11. The case proceeded to hearing. The plaintiff's case was supported by his evidence wherein he adopted his witness statement as evidence in chief and reiterated that he boarded Smart Coach Registration No. KCS 278A heading from Nairobi to Oyugis.

12. That at Jacaranda around Gilgil, along the Naivasha – Nakuru highway, the driver of the bus lost control of the vehicle, swerved and hit motor vehicle registration No. KBS 570V Toyota Harrier and the bus landed on its side. As a result, he was injured on his hand shoulder and knee and treated at Nyangena Health Centre at Oyugis.

13. The respondent's case was also supported by the evidence of PW2 No. 86335 PC Paul Kimani from Gilgil Police Station who produced the police abstract on behalf of the investigating officer and stated that the results investigations revealed the 1st appellant was to blame for causing the accident.

14. Further evidence for the respondent was adduced by PW3 Dr. Obed Omuyoma who produced a medical report dated 28th February, 2019 in which he indicated that examination of the respondent revealed tenderness on the anterior chest wall on palpation, fracture of the right clavicle, restricted movement of the left shoulder due to pain and a fresh permanent scar 4cm long on the right knee joint. The doctor classified the degree of injury as grievous harm.

15. The defence closed their case without calling any witnesses.

16. By a judgment delivered on 2nd December 2021, the trial court entered judgment in favour of the respondent against defendants as follows: -

    a. The defendants are held 100% liable for the accident;

    b. The plaintiff is awarded general damages of Kshs. 500,000;

    c. The plaintiff is awarded special damages of Kshs. 5,550

    d. The plaintiff is awarded costs of the suit plus interest.

17. However, the appellants are aggrieved by the decision of the trial court and appeal against it on the following grounds as verbatim reproduced: -

    a. That the learned magistrate erred in law in making a finding of damages against the defendants;

    b. That the learned magistrate erred in law and fact in holding that the defendants was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same;

    c. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to General damages of Kshs. 500,000 without any tangible proof of the same;

    d. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 5,550 allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence;

    e. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess quantum and special damages without concrete documentary evidence.

    f. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages;

    g. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages;

    h. That the learned magistrate erred in law and fact in entering judgment in favour of the plaintiffs against the defendants in spite of the plaintiff's miserable failure to establish her case more especially on quantum;

i. That the learned trial 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;

j. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellant;

k. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;

18. As a result, the appellants pray for the following orders: -

a. That the appeal be allowed.

b. That the whole judgment of the Honourable Senior Resident Magistrate Y. M. Barasa in Naivasha CMCC No. 376 of 2019 be set aside and that both quantum and liability be assessed afresh.

c. That the costs of this appeal be awarded to the appellant.

d. That such further orders may be made by this Honourable court may deem fit to grant

19. The appeal was disposed of vide filing of submissions. The appellants filed submissions dated; 4th March, 2023 and dwelt mainly on the issue of general damages awarded.

20. It is argued that taking into account the injuries the respondent suffered, the general damages of Kshs. 500,000 awarded by the trial court was inordinately too high. The case of *Kenya Power of Power Lighting Company Limited & another v Zakayo Saitoti Naingola & another* (2008) eKLR was cited which referred to the case of; *Jennifer Mathenge v Patrick Muiruki Maina* [2020] eKLR where the court stated the principles to be considered before an appellate court can interfere with an award of damages.

21. That the principles to be considered states that the damages awarded should not be inordinately too high or low as they are meant to compensate a party for loss suffered but not to enrich a party and should be commensurate to injuries suffered. Further, where past decisions are taken into consideration they should be taken as mere guides as each case depends on its own facts. Furthermore, inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of judgment.

22. The appellants submitted that an award of Kshs. 250,000 as general damages would be sufficient compensation and relied on the case of; *Gerald Muhuthia Mwangi v John Mburugu & another* [2022] eKLR where the appellant sustained a fracture of distal right clavicle with superior displacement, bruises on the right shoulder and soft tissue injuries on the back. That the High Court upheld the awarded of Kshs. 280,000 as general damages.

23. Further, in the case of *Lynnn Kambua Enterprises v Edith Vaati Simon Kasika* (2021) eKLR, the High Court re-affirmed the award of Kshs. 350,000 as general damages where the respondent sustained soft tissue and blunt injuries and fractured her left clavicle.

24. Furthermore, in the case of; *Richard Maisiba Gichana v Kenvin Ongaki Tengeya* [2019] eKLR the court upheld the award of Kshs. 350,000 where the respondent suffered a deep cut wound on the wrist and left lateral 1/3 clavicle fracture.

25. Finally, the respondents submitted that costs follow the event and cited section 27 of the *Civil Procedure Act* (Cap 21) Laws of Kenya and urged the court to allow the appeal as prayed and award them costs of the appeal.

26. However, the respondent in submissions dated; 13th February, 2023 argued that on liability, that he proved his case on a balance of probability. That he was a fare paying passenger in and cannot be blamed for causing the accident. He relied on the case of; *Robert Gichuchu Maina v John Kamau* (2004) eKLR where the it was stated that a lawful passenger cannot be held liable for an accident unless it is expressly demonstrated that there is something he failed to do or did.

27. That in addition, PW2 PC Kimani produce the police abstract which indicated that the driver of the appellant's vehicle was to blame for causing the accident and that evidence was not rebutted by the appellants.

28. On the issue of general damages, the respondent relied the case of *Butt v Khan* [1977] 1 KAR and *Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (1982 – 88) KLR 727 where the court stated the principles upon which an appellant court will interfere with an award of damages as that the award is inordinately too high or too low as to represent an entirely erroneous estimate; or the judge proceeded on the wrong principles or misapprehended the evidence in material respect and arrived at an inordinately too high or too low figure.

29. That the trial court award of Kshs. 500,000 as general damages was justifiable considering the severity of the injuries suffered. He cited the case of; *Lawrence Wairimu Wanyoike & Another v Joseph Letting* [2021] eKLR where the respondent sustained a deep cut wound on the forehead, fracture of the left clavicle, blunt injury to the chest and shoulder and the High Court reaffirmed the trial court award of Kshs. 800,000 as general damages.

30. Further, in the case of; *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko* [2019] eKLR the High Court upheld the award of general damages of Kshs. 700,000 where the plaintiff suffered a fracture of the right clavicle.

31. Similarly, in the case of; *Sheikh Abdulqadir Mohamed Ahmed Shallo v Julius Mutiso Mumo* [2018] eKLR the High Court upheld general damages of Kshs. 500,000 awarded by the trial court where the plaintiff suffered bruises to the neck, contusion and bruises to the cheeks and knees, contusion to the left leg and a displaced fracture of the left clavicle with permanent partial disability assessed at 3%.

32. Furthermore, in *H. Young & Company E.A. Ltd v Edward Yumatsi* [2016] eKLR the plaintiff sustained a deep cut wound on the head, bruises on the knee, cerebral concussion, fracture of the right clavicle bone and deep cut wound on the left elbow. That the High Court upheld the general damages of Kshs. 500,000.

33. Lastly, the respondent relied on the case of; *Hahn v Singh* Civil Appeal No. 42 of 1983 [185] KLR 716 where the Court of Appeal stated that special damages must not only be specifically pleaded but strictly proved. He submitted that he specifically pleaded and proved the special damages and therefore the trial court rightfully awarded the same.

34. In considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.

35. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

36. As regard liability, I note that the respondent was a lawful paying passenger. He was not the driver of any of the motor vehicles that were involved in the accident. In his pleadings he blamed the driver of the appellant's motor vehicle who was sued as the 1st respondent. The other appellants were sued as the registered and/or beneficial owners of motor vehicle registration No. KCS 278 Isuzu Bus.

37. In the statement of defence filed dated 22nd August 2019, the appellants blamed the respondent and attributed certain particulars of negligence on his part. However, during the trial the appellants did not adduce any evidence to support their defence and/or rebut the respondent's evidence as to stating how the 1st appellant drove the subject motor vehicle in a negligent manner and caused the accident.

38. It suffices to also note that it is indicated in the police abstract produced that the 1st respondent who was the driver of the motor vehicle KCS 278 Isuzu Bus was held to blame. No blame was placed on the respondent. As such, the finding of the trial court that, the appellants were 100% liable for the accident is proper and well founded. I uphold it and will not interfere with it.

39. On the issue of quantum, the law is settled that, the 1st appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shah* (1968) EA and *Mkube v Nyamuro* 1983 KLR 403.

40. Similarly, the Court of Appeal in *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* CA 142/2003 (unreported) stated that:

> "We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257)."

41. In the same vein, the Court of Appeal further stated in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] eKLR that:-

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant

one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

42. On the award of quantum, the Court of Appeal in the case of; *Coastal Kenya Enterprises Limited v Muchiri* (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated that:

> " In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & Others v Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd v Shephard* [1964] AC 326 at 345 that:
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> > "Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional."

43. As regards, quantum, I note that, the respondent pleaded that, he sustained blunt injury to the chest leading to the fracture of right clavicle, soft tissue injury on the left shoulder joint and both knee joints. The doctor who filled the P3 form reflected injuries as soft tissue injuries to the chest, left shoulder and laceration on the knees. He classifies the degree of injuries as grievous harm.

44. In the same vein Dr. Obed Omuyoma's report dated; 28th February 2019 reflected similar injuries as those pleaded and classified the degree of injury as grievous harm.

45. The appellants indicated in the list of its witnesses that, a medical doctor would testify but none was called to do so, and neither did the appellants' produce any medical report.

46. In the submission filed in the lower court, the appellants proposed a sum of Kshs 150,000 as general damages. The respondent's submissions are not included in the record of appeal. However, I gather from the judgment the respondent sought for a sum of Kshs 800,000.

47. The trial court awarded Kshs 500,000 and justified the same based on the decision cited judgment but did not analyse the similarity or otherwise of the injuries in those authorities and those herein.

48. As such it becomes rather difficult for the appellate court to fully appreciate the reasoning behind a decision where the trial court does not indicate a comparison of injuries in the authority relied on and injuries in the matter before the court. That leads to doubt as to whether the trial court indeed analysed the submissions of the parties well.

49. Be that as it were, I have considered the authority cited by the trial court as *Board of Management Sasura Girls Seondary School & Another v Grace Wangari Mwangi* (2021) eKLR I note that, the plaintiff therein suffered similar injuries as herein, being a fracture of clavicle, injury to the right shoulder, cut wound parietal region of the head, left ear, medial angle of left eye and left foot and an award of Kshs 500,000 was given in the year 2021.

50. Pursuant to the aforesaid, I find and hold that taking into account the decisions cited by both parties, in particular the respondent's where a sum of Kshs 180,000 was awarded over ten (10) years ago in the decision of *Fast Choice Company Limited & Another v Hellen Nungari Ngule* HCCA No. 6 of 2010, where the plaintiff suffered a fracture of humerus and soft tissue injuries and further considering the

period of which the matter herein has been in court, since 2019 over five (5) years, and the inflation factors, the sum of Kshs 500,000 awarded as general damage is fair, reasonable and just. I decline to interfere with the lower court's finding on quantum.

51. The appeal is dismissed in its entirety.

52. It is so ordered

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF AUGUST 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Njuguna for the appellant

Ms. Adan for the respondent

Ms. Ogutu: court assistant