Emuria v Registered Trustees Catholic Diocese of Maralal (Civil Appeal E033 of 2021) [2024] KEHC 10083 (KLR) (12 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E033 OF 2021

GL NZIOKA, J

AUGUST 12, 2024

BETWEEN

GABRIEL SILALI EMURIA ..... APPELLANT

AND

REGISTERED TRUSTEES CATHOLIC DIOCESE OF MARALAL ..... RESPONDENT

(Being an appeal from the decision of Honourable K. Bidali (CM) delivered on 23rd June 2021, vide Naivasha CMCC No. 1013 of 2018)

JUDGMENT

1. By a plaint dated 24th October, 2018 the plaintiff (herein "the appellant") sued the defendant (herein "the respondent") seeking for judgment against for:
    a. General damages;
    b. Special damages Kshs. 93,320;
    c. Cost of this suit;
    d. Costs of future medical expenses to be stated at the hearing.
2. The appellant's case is that on or about 9th May, 2018, he was travelling along the Nakuru – Naivasha road as a lawful pillion passenger on motorcycle registration No. KMDD 826W. That on reaching Delamere area, a motor vehicle registration number KCC 538D, registered in the name of the defendant, lost control and hit the motorcycle thus causing the accident.
3. That as a result of the accident he sustained the following injuries:
    a. Fracture distal end of the left femur;

b. Fracture proximal end of the left tibia and fibula;

c. Severe soft tissue injuries of the left leg.

4. The appellant attributed the cause of the accident to negligence of the defendant's authorized driver and/or agent in that he drove the motor vehicle carelessly, without due care and attention, by driving in a zigzag manner, on the wrong-side of the road, at an excessive speed and by failing to slow down, stop, brake, swerve or act in any way to avoid the accident.

5. Further that he failed to keep a proper look out for other road users and/or have regard for other road users. The appellant relied on the provisions of the *Traffic Act*, Highway Code and the doctrine of "Res ipsa loquitor".

6. However, the respondent filed a statement of defence dated; 9th November 2018 and denied that the accident occurred as alleged and/or the particulars of negligence attributed to it in the plaint. The respondent further denied ownership of the vehicle allegedly driven by its agent and put the plaintiff to strict proof thereof.

7. However, on a without prejudice basis, the respondent averred that, if the accident occurred which it denied, then it was caused solely or substantially contributed to by the negligence of the rider of the motorcycle and the appellant.

8. That, the rider of the subject motorcycle was negligent as he was riding the motor cycle without due care and attention. That he drove at a reckless speed and abruptly appeared in the way of motor vehicle registration KCC 538D. Further he failed to heed warnings by the driver of the vehicle when he hooted at him, and/or brake or swerve to avoid the accident. Furthermore, he failed to wear protective apparel to wit a helmet and reflective jacket.

9. The respondent averred that the appellant on his part was negligent by failing to wear a protective apparel to wit a helmet. The respondent relied on the doctrine of Res ipsa loquitor.

10. The case proceeded to hearing. The appellant adopted his witness statement as evidence in chief in which he reiterated the averments in the plaint. He maintained that the respondent's vehicle exited the petrol station to join the main highway without giving way and hit the motorcycle from the left side.

11. That he was injured and rushed to Naivasha District Hospital where he was admitted for two (2) days as he had sustained two fractures on his left leg. That he was then referred to Provincial General Hospital at Nakuru for an operation for open reduction and internal fixation of the fracture femur. He remained admitted for one and a half months.

12. The plaintiff's case was further supported by the evidence of PW2 No. 62680 PC Martin Mwenda attached to Traffic office at Naivasha Police Station who produced the police abstract dated 1st May 2018. The abstract indicates that the respondent's driver was blamed for the accident for failing to give to the cyclist.

13. The respondent closed its case without calling any witnesses, and the parties filed submissions in support of their respective case.

14. By a judgment delivered on 3rd November, 2022, the trial court entered judgment in favour of the appellant as against respondent as follows: -

a. Liability 80%:20% in favour of the plaintiff

b. General damages---- Kshs. 800,000

c. Special damages--- Kshs. 91,870

d. Total--------- Kshs. 891,870

e. The plaintiff will have costs and interest

15. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced: -

a. That the learned trial Magistrate erred in law and in fact in finding the plaintiff liable to the extent of 20% liability when there was no justification and/or evidence adduced by the defence to contradict the plaintiff's evidence.

b. That the learned trial Magistrate erred in law and in fact in failing to make a finding on the costs of future medical expenses.

c. That the learned trial Magistrate erred in law and in fact in failing to consider the plaintiff/ appellant's submissions on quantum and future medical expenses payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant and failing to award anything under future medical expenses.

d. That the learned trial Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding judgment on liability and thereby ending up apportioning liability at 80:20 without any evidence in support of the same.

16. As a result, the appellant prays for the following orders: -

a. That the judgment/decree of the Honourable court dated 23rd June, 2021 be reviewed and/or set aside and re-access judgment on both liability and damages payable to the appellant.

b. That the respondent do bear the costs of this appeal.

17. The appeal was disposed of vide filing of submissions. The appellant tendered submissions dated; 14th February, 2023 and cited the case of Nance vs British Colombia Electric Railway Co. Ltd v(1951) A.C 601,613 and Mbogo vs Shah (1968) E.A. 93 where the court outlined the principles to be considered before an appellate court can interfere with the decision of the trial court.

18. That, an appellate court should not interfere with the discretion of a judge unless satisfied there was misdirection in some matters and as a result the court arrived at the wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in exercise his discretion and as a result there was misjustice.

19. The appellant further submitted that, there was no justification for the trial court to apportion liability at 80:20% as he was not at fault considering that he was a pillion passenger. Further, the evidence adduced established a prima facie case against the respondent and it was upon the respondent to rebut the said evidence.

20. He relied on the case of; Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another (2015) eKLR where the Court of Appeal quoted with approval Denning J in; Miller vs Minister of Pensions (147) ALLER 372 where the Judge stated that, the burden of proof in civil cases is on a balance or preponderance of probabilities however narrow. That, if a tribunal cannot decide which evidence to accept and both parties are equally (un)convincing the party bearing the burden of proof will lose for failing to attain the requisite standard.

21. The appellant argued that, the respondent failed to call any witness and therefore did not challenge the appellant's evidence. He relied on the case of Nandwa vs Kenya Nazi Ltd (1988) eKLR and Autar Singh Bahra & Another vs Raju Govindji HCCC No. 548 of 1998 where it was stated that the plaintiff's case remains unchallenged where a defendant fails to call a witness to give evidence on his behalf despite having denied liability in his defence.

22. The appellant further submitted that the respondent's vehicle was not stationary and that it rammed into the motorcycle while trying to join the highway. That, the respondent having failed to give any explanation on the occurrence of the accident, it was 100% liable for causing the accident.

23. The appellant further relied on the case of; Joyce Mumbi vs The Co-operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004, where the Court of Appeal stated that when vehicles are driven in a normal and reasonable speed on the correct side of the road, they do not run into each other. If anything of that kind happens an explanation must be given by either the driver, a passenger in the vehicle or a bystander who saw a particular thing happen to cause the vehicle to veer of the road or into the path of another vehicle.

24. On the issue of quantum, the appellant submitted that he had sought general damages of Kshs. 1,800,000 in the trial court and relied on the case of; *Kennedy Ooko Ouma vs Joseph Maina Kamau & Another Naivasha HCCA 4 of 2016*. However, the trial court found the case was not relevant and relied on cases decided between the year 2015 and 2018 where the award ranged between Kshs. 600,000 and Kshs. 1,000,000.

25. He distinguished the precedent relied on by the trial court arguing that the plaintiffs therein had healed from their injuries. That in the present case, he had not healed from his injuries and had screws in his body that required to be removed. In the circumstances and taking into account inflation, he urged that the award of Kshs. 800,000 made by the trial court was on the lower side and should be set aside and increased.

26. Finally, the appellant submitted that the learned trial Magistrate for failed to consider the costs of future medical expenses despite the medical report by Dr. Omuyoma which was produced by consent of the parties and which indicated that, the appellant required Kshs. 100,000 to remove the metal plate.

27. That once the future medical costs are pleaded and evidence is adduced it becomes awardable. He placed reliance on the case of; Tracom Limited & Another vs Hassan Mohammed Adan (2009) eKLR where the Court of Appeal found that future medical expenses had been pleaded in the plaint and stated that even if it had not been pleaded it had been framed as an issue and left for the determination of the court.

28. The respondent did not file any submissions despite being accorded several opportunities to do so.

29. 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 vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

30. 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.", t

31. On the issue of liability, the appellant at paragraph 4 of the plaint blamed the respondent and/or its agent for the accident and the respondent at paragraph 5 of the statement of defence blamed the rider of motor cycle for having contributed to the accident.

32. In the same vein, in the statement of Evans Onyengo the defence witness shifted the blame to a matatu which was in a hurry and which caused the rider to swerve and hit the respondent's motor vehicle. There is no blame attributed to the appellant.

33. However, the trial court while apportioning 20% contributory negligence liability on the part of the appellant stated as follows: -

> " The court has a duty to analyze the contradictions and inconsistencies in the evidence of the witnesses. And as stated earlier this case has its fair share of contradictions in the evidence of PW2. The plaintiff's injuries are without doubt serious. It is not clear why the police investigations are still pending nearly 3 years after the event. The defendant submits that its vehicle was stationary at the time of the accident. But there is no evidence confirming this. Having taken all circumstances into account and more specifically the failure by the police to make any finding after investigations, and solely relying on the evidence of the plaintiff, I find that the plaintiff ought to shoulder 20% of the blame. I enter judgment on liability in the ratio 80%:20% in favour of the plaintiff as against the defendant."

34. The above finding by trial court indicates that the court blamed the investigators of the case for the delay in concluding the investigations. The appellant had no legal or moral obligations to investigate the case and therefore could not be blamed for the failure by the police officers to conclude investigations for over three (3) years after the event.

35. Further, in the same finding the trial court indicates that, there were contradictions in the evidence of PW2 PC Mwenda as to who was to blame for the accident. But it suffices to note that, the plaintiff was neither the rider of the motor cycle nor the motor vehicle that were involved in the accident. So whether it was either of the cyclist or driver, no blame lay on the appellant.

36. Furthermore, the trial court states that, "the defendant submitted that its vehicle was stationary at the time of the accident." The defendant did not testify thereof the court cannot have relied on its submissions to hold against the appellant.

37. Further still, the trial court in the same finding observes that, there was no evidence to support the statement of defence. Therefore, the appellant having been a pillion passenger and his evidence of how the accident occurred having been uncontroverted, could not shoulder any liability.

38. Finally, as stated herein the respondent blamed third parties and was at liberty to take out third party proceedings against the subject matatu or rider. I therefore set aside the 20% contributory negligence or liability attributed to the appellant and hold the respondent 100% liable.

39. On quantum, I note 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 Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

40. In that regard the Court of Appeal in Loice Wanjiku Kagunda vs. 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 vs Musila [1984] KLR 257)."

41. Similarly, 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 vs Anna Mary Kinanu [1983] KLR 114; where it was held while relying on the oft-cited case of H West and Son Ltd vs 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."

42. On the issue of future medical expenses, the Court of Appeal in the case of Tracom Limited & another v Hassan Mohamed Adan (Supra) stated as follows: -

> " The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. 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: -
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> '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 thereon 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 arising naturally from the infringement of a person's legal right should be pleaded.'
>
> We understand that to mean that once the plaintiff pleads that there would be 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 the treatment will be 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 all 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."

43. However, the Court of Appeal in *Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor (Civil Appeal 58 of 2020*) [2021] KECA 52 (KLR) (8 October 2021) (Judgment) in reference to the decision in Tracom Limited & another v Hassan Mohamed Adan (supra) stated as follows:

> " 28. As has been held above, in as much as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.
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> 32. On the challenge to the award on future medical expenses which the appellant says had not been specifically pleaded and proved, this does not turn on much as the respondent had in their plaint stated that the minor requires additional and medical care. In our view, the functional prosthesis (artificial limbs) and their maintenance costs are covered under that prayer and as held in Tracom Limited & another v Hasssan Mohamed Adan (supra) it was not mandatory for the respondent to delve into detail of the future expenses at that stage thus that ground of appeal fails.

44. Similarly, in the case of, *Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018*) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal in overturning the decision of the High Court not to award future medical expenses on the ground that the plaintiff had pleaded generally on the same but had failed to attach a specific figure thus lacked specificity stated as follows: -

> " 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

45. As regards quantum I find that as properly stated the award of Kshs 1,500,000 which the appellant sought for was not tenable taking into account the fact that, the authority relied on was of more severe injuries including; fracture of acetabulum which predisposed the appellant to requiring total hip replacement.

46. On the other part, notably, all the authorities cited by the respondent did not address injuries suffered by the parties therein, therefore there was no basis for proposed general damages of Kshs 500,000.

47. It is trite law that damages awarded must be comparable based on similarity in the nature of injuries sustained as stated in the case of; Arrow Car Limited vs Elijah Shamalla Bimomo & 2 others [2004] eKLR.

48. Be that as it may, I note that the learned trial Magistrate supported the award of Kshs 800,000 by legal authorities indicated in the judgment. I find no justifiable cause to interfere with that award, more so by virtue of the fact that, special damages were awarded as prayed.

49. Finally as regards the future medical expenses the same had been pleaded. The report of Dr. Omuyoma placed the same at Kshs 100,000. The respondent in its submission conceded to the same. The trial court did not address it at all. It was a serious omission which I hereby correct by awarding Kshs 100,000 as future medical expenses.

50. The resultant award herein is as follows:

    a. General damages----- Kshs 800,000

    b. Future medical expenses--- Kshs 100,000

    c. Special damages-------- Kshs 91,870

    Total sum---------- Kshs 991,870

    e. Plus cost and interest from date of judgment in the trial court until payment in full.

    f. Each party to meet its own costs of the appeal.

51. Ordered accordingly.

DATED, DELIVERED AND SIGNED THIS 12TH AUGUST, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Owour for the appellant

Mr. Ombeo for the respondent

Ms. Ogutu: court assistant