Muywoki alias Ann Munywoki alias Ann Munyoki v Wario (Civil Appeal E071 of 2021) [2024] KEHC 11551 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E071 OF 2021

FR OLEL, J

SEPTEMBER 30, 2024

BETWEEN

ANNA MUYWOKI ALIAS ANN MUNYWOKI ALIAS ANN MUNYOKI ..... APPELLANT

AND

OSMAN GODHANA WARIO ..... RESPONDENT

(An appeal from the Judgement of the learned Magistrate Honourable Mr I.G Ruhu (RM), delivered at Mwingi on 28th October, 2021 in Mwingi PMCC No 25 of 2019)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment/decree of Honourable Mr I.G Ruhu, Resident Magistrate delivered on 28th October 2021 in Mwingi Chief Magistrate court case no. 25 of 2019, where he found the Respondent 100% liable for the accident that occurred on 25th August 2018, but because the appellant had not proved the nature of injuries suffered, the trial magistrate failed to award her any sum for general damages. On special damages, the appellant was awarded Ksh.5,500 plus costs and interest of the suit.

2. The Appellant had filed her claim as against the respondent claiming damages in tort. In the plaint and witness statement, she averred that on the night of 24.08.2018 into the morning of 25.08.2018, she was lawfully travelling as a fare paying passenger in motor vehicle registration Number KCR 128G Nissan Caravan Matatu,(hereinafter referred to as the suit motor vehicle) along Mwingi -Garissa Road , when the respondents driver, servant or agent drove, controlled and/or managed the said suit motor vehicle in a negligent and reckless manner that he caused and/or permitted it to lose control, veer off the road and violently overturn in consequence whereof she sustained sever personal injuries, loss and damage for which she held the respondent herein liable.

3. The respondent did file his statement of defense denied owning the suit motor vehicle, as well as the facts relating to the occurrence of the accident. He further denied all the particulars of negligence, carelessness and recklessness attributed to him and/or his servant, employee or agents and put the appellant to strict proof thereof. In the alternative the said respondent also blamed the appellant for causing and/or contributing to this accident and particularized negligence attributed to her. The respondent therefore prayed for the said suit to be dismissed with costs.

B. Evidence

4. PW1 Ann Munyoki, relied on her witness statement. On the material night they were travelling as church members in the suit motor vehicle from Kitui enroute to Garissa. When they reached around Kwa Kitoo area, the suit motor vehicle which was being driven at high speed lost control, veered off the road and violently overturned in consequence whereof she sustained sever bodily injury. After the said accident, she was rushed to Mwingi sub county hospital, where she was treated and discharged. PW1 later reported the incident at Mwingi police station and was issued with a P3 form and police abstract. She blamed the driver of the said suit motor vehicle for driving recklessly and without regard to the safety of his passengers and other road users. PW1 did produce all her claim supporting documents as Exhibits to support her case.

5. Upon cross examination PW1 confirmed that she was with other family members in the said suit motor vehicle, when the accident occurred and they had fasten their seat belt. The incident had occurred during the night at about 11.00pm and they were rushed to Mwingi hospital for treatment. Later she did visit the hospital on 01.09.2018 and was given her treatment notes, but she did not know why the same were dated/ stamped 12.09.2018. In re-examination, PW1 reaffirmed that she was treated at Mwingi hospital. she did not work at the said hospital and could not know the reason, why they mis stamped her document. Further she had receipts from the said hospital confirming that indeed she had been treated on the material day.

6. DW1 Emilio Wachira Mutuku stated that he worked as a Health records officer at Mwingi level 4 hospital and produced as an exhibit his letter dated 18.04.2019, which letter confirmed that PW1 was not treated at Mwingi hospital on 26.08.2018, and the availed treatment notes did not any the patient outpatient number nor did it bear the names of the attending clinician. PW1 however appeared in their system on 11.09.2018. In short, it was his opinion that PW1 was never treated at the said hospital on 26.08.2018 as alleged. Upon cross examination, DW1 reiterated his line of evidence that the treatment shits produced by PW1 were not authentic as the patient's name did not appear on their register of the accident date and the outpatient card used had no number which could be used to identify her. Finally, her treatment notes too had a signature but no name of the clinician who attended to her. He also confirmed that there was no records officer on duty on the material night and a patient had no control over record keeping systems which they had at the facility.

7. Upon considering the evidence submitted, submissions filed, the trial court did enter judgment for the appellant on the following terms;

    i. Liability - 100%

    ii. General Damages - Nil

    iii. Special damages - Ksh. 5,550/=

    Plus, cost and interests

8. The appellant being wholly dissatisfied by the said judgement, especially on the non-award of general damages did file her memorandum of appeal dated 9th October 2020 and raised the following grounds of appeal;

    a. That the learned magistrate erred in fact and in law in not awarding general damages for pain and suffering whereas the same was pleaded and proved by the appellant during trial on 17.09.2020, also bearing in mind the injuries sustained by the Appellant and the effects of the injuries.

    b. That the learned Magistrate misdirected himself in law and in fact by failing to appreciate the evidence by the appellant adduced during trial on 19.09.2020 and placed reliance to the respondents witness in terms of quantum.

    c. That the learned Magistrate erred in law and in fact by failing to appreciate the appellants submissions and authorities attached thereto in respect to awards granted by the other judicial officers in cases where victims with similar injuries with the Appellant have been granted and;

    d. That the learned Magistrate erred in law and in fact by failing to be guided by the general principle in assessing damages which is that similar injuries should attract similar awards and also taking into consideration the peculiar mature of the injuries in each case, effect of inflation in the value of money and the sequel of the injuries

9. The Appellant urged the court to find that the appeal filed had merit, it be allowed and the court do award the appellant general damages for pain and suffering as proved in court on 17.09.2020.

C. Analysis & Determination

10. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Other*s [1968] EA 123) & *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR,

11. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Ouseph* AIR 1969 Keral 316.

12. The only issue for consideration is this appeal is whether the trial magistrate made the correct call, in finding that the appellant had used falsified medical treatment notes to prove her injuries and therefore was not entitled to an award of general damages.

13. The appellant did plead that as a result of the said accident, she did suffer the following injuries; tender cut wound over the face, tender lacerations over the right eyelids, tenderness all over the neck and shoulders, haematoma formations over both thighs and cut wound over the right leg. The appellant relied on case summary from Mwingi level 4 hospital (P Exhibit 4), P3 form (P Exhibit 6) and medical report by Dr Muli (P Exhibit 8) to confirm that indeed she was injuries and had sought treatment for the same. DW1 on the other hand testified and stated that PW1 was treated at the facility on 11.09. 2018 and not on 25.08.2018 and her treatment notes were suspicious as it only bore a signature but had no name of the clinician who attended to her. The trial magistrate did consider the evidence presented

and affirmed that the veracity of the treatment notes could not be ascertained and the only conclusion was that the same were not genuine.

14. With utmost respect to the trial magistrate, he did fall in error as he failed to consider the evidence of DW1 in cross examination. The said witness confirm that,

> " if an accident occurred in the wee hours of the morning e.g 3.00am, I confirm there was no record officer at that time ..... the records department allocates numbers to patients. There was no records officer at the wee hours but there is usually a casual."

15. It is a fact that this accident occurred late at night of 24.08.2018 into the wee hours of the following morning of 25.08.2018. DW1 confirmed that at these odd hours, the records department are not manned, and the court also takes judicial notice that it is a fact that most public hospitals are understaffed. In all likely hood as patients caught up in an accident are brought in at these wee hours, they would be attended to without getting registered in the hospital system first and that logically would explain why PW1 was not registered as a patient on the material night.

16. Secondly the lack of the name of the clinical officer, who treated PW1, on the treatment notes might raise suspicion, but in law suspicion however strong cannot be the basis of a conviction and/or negative finding that the document is a forgery, when no cogent evidence of forgery has been presented by the person so alleging. I therefore do find that the trial magistrate fell into error in holding that the appellant's medical treatment notes were not genuine and thereby wrongly refused to award the appellant general damages, which she was entitled to.

17. With regards to interference with the award of damages, it was observed in the case of *H. West & Son Ltd v. Shephard* [1964] AC 326, that:

> " ...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

18. The Court of Appeal in *Sheikh Mustaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 also held 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..."

19. The law requires that even if the plaintiff does not prove damages, the court must still access the same and the trial magistrate did award the appellant a sum of Kshs.250,000/= based on similar awards. I have re-examined the medical documents and treatment notes, which confirm that the appellant did suffer soft tissue injuries for which she was treated and discharged on the same day. I do find that the

award proposed of Kshs.250,000/= is on the higher side based on similar injury awards made during the relevant period and the then inflationary rates. I do reduce the same to Kshs.150,000/=.

E. Disposition

20. The upshot is that this appeal is merited. I do partially set aside the Judgement/decree issued in Mwingi PMCC No 25 of 2019 dated 28th October 2021 with regard with award to general damages for pain suffering and loss of amenities and substituting the same by awarding the Appellant a sum of Kshs.150,000/=. The other finding of the said Judgment will stand.

21. Each party will bear their own costs of this Appeal.

22. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30TH DAY OF SEPTEMBER, 2024

In the presence of:-

No appearance for Appellant

No appearance for Respondent

Susan/Sam Court Assistant