Erick Kenyamanyara v Moses & another (Civil Appeal 360 of 2015)
[2024] KEHC 11241 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11241 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 360 OF 2015

JN NJAGI, J

SEPTEMBER 27, 2024

BETWEEN

ERICK KENYAMANYARA ..... APPELLANT

AND

STANLEY MOSES ..... 1ST RESPONDENT

ROBERT MWANGI MUTURI ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. Chesang (Mrs), Resident Magistrate, in Nairobi MCC Civil Case No. 7777 of 2012 delivered on 29/6/2015)

JUDGMENT

1. The appellant herein instituted suit against the respondent after he was purportedly hit by a motor vehicle belonging to the 1st respondent and which was being driven by the 2nd the respondent at the time of the accident. The appellant sought compensation in general and special damages for the injuries suffered. The respondent denied the claim. After a full trial the trial court held that the appellant had failed to prove liability on the part of the respondents and dismissed the claim. The appellant was aggrieved by the judgment and lodged this appeal.
2. The appeal raised 15 grounds of appeal, to wit:
    1. That the learned trial magistrate erred and misdirected herself in both fact and law on the evidence led by the Appellant on quantum thereby arriving at an erroneous finding on the same.
    2. That the learned trial magistrate erred in both fact and law by finding that the treatment note issued by the South B Hospital did not confirm that the Appellant was injured.

3. That the learned trial magistrate erred in both fact and law by finding that the injuries on the P3 form were at variance with the injuries listed in the plaint.

4. That the learned trial magistrate erred and misdirected herself in both law and fact by finding that the P3 form was made on the 12th August 2010 contrary to the evidence led by the Appellant showing that the P3 form was completed on 19th September 2008.

5. That the learned trial magistrate erred and misdirected herself in both law and fact by finding that the P3 form was made on 12th August 2010 allegedly a day after the accident when the P3 the subject of the Appellant's case was made on 19th September 2008.

6. That the learned trial magistrate erred and misdirected herself in both law and fact by disregarding the doctor's evidence despite the doctor having attended court and producing the medical report.

7. That the learned trial magistrate erred and misdirected herself in both law and fact by abstract dated 21st August 2008 when the Abstract produced by the Appellant was dated 21st October 2008.

8. That the learned trial magistrate erred and misdirected herself in both law and fact by finding that there was an obligation on the part of the Appellant to call the police officer to produce the police abstract when the police abstract had already been produced and admitted in evidence with the consent of parties.

9. That the learned trial magistrate erred and misdirected herself in both law and fact by finding that the Appellant had failed to discharge the burden of proving entitlement to an award of damages inspite of the overwhelming evidence led by the Appellant to support an award of damages.

10. That the learned trial magistrate erred and misdirected herself in both law and fact by failing to assess damages despite the evidence led by the Plaintiff.

11. That the learned trial magistrate erred and misdirected herself in both law and fact by failing to make a determination on liability inspite of the evidence led by the parties.

12. That the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the evidence adduced in the subordinate court by the Appellant in support of his case.

13. That the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the submissions made on behalf of the appellant.

14. That the learned trial magistrate erred in law and in fact by failing to understand and/or appreciate the issues for determination.

15. That the learned trial magistrate misrepresented the facts and evidence and misinterpreted the law on the subject matter.

3. The appeal was disposed of by way of written submissions of the advocates appearing for the parties.

Appellant`s Submissions

4. The appellant submitted that the trial court did not make a determination on the issue of liability as against the 2nd respondent. It was submitted that the appellant in his pleadings and in his evidence blamed the 2nd respondent for causing the accident. That he denied in cross-examination that he caused

the accident. It was submitted that the appellant had established that the circumstances of the accident showed that the 2nd respondent was the sole author of the accident in that he caused his motor vehicle to collide with the appellant. The appellant urged the court to find the 2nd respondent wholly liable for the accident.

5. On quantum the appellant submitted that the trial magistrate dismissed the claim on quantum without any basis.

Respondents` Submissions

6. The 2nd Respondent submitted that the appellant did not prove, on a balance of probabilities, liability on the part of the 2nd respondent. That the evidence of the appellant that the 2nd respondent`s vehicle veered off the road and hit the appellant was not supported by any independent witness. That the medical documents produced in the case did not prove the injuries purported to have been sustained by the appellant.

7. It was submitted that the appellant did not discharge his burden of proof that the 2nd respondent was to blame for causing the accident. Neither did he show that the 2nd respondent contributed to the occurrence of the accident. The 2nd respondent urged the court to dismiss the appeal.

Analysis and determination

8. This being a first appeal in the matter, the duty of this court is as was stated in Selle vs. Associated Motor Boat Co. [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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."

9. The appeal is on both liability and quantum of damages. I will deal with the two issues as hereafter.

Liability

10. The appellant pleaded in his plaint that he was on the 11th August 2008 at about 7 am lawfully walking along North Airport road when the 2nd respondent negligently drove motor registration number KAS 807F thereby causing the same to collide into him wherein he sustained serious injuries. The same statement was repeated in the appellant`s written statement dated 5th November 2012.

11. The 2nd defendant in his written statement of defence dated 8th June 2010 denied the occurrence of the accident and in addition stated that if the same did occur, it was caused by the sole negligence of the appellant. The 2nd respondent in his witness statement dated 26th January 2013 stated that the accident was caused by the appellant walking or jumping into the lawful path of the respondent`s motor vehicle without due care and attention.

12. The appellant was the only witness in his case on how the accident occurred. He relied on his witness statement as his evidence-in-chief and did not offer any further evidence on how the accident occurred,

except for saying that the respondent was overlapping at the time of the accident. He did not give any details as to the manner the 2nd respondent was overlapping. He denied in cross-examination that he was crossing the road when the accident took place.

13. The 2nd respondent was the only witness in his case. He also adopted his witness statement as his evidence-in-chief in the case. He stated in cross-examination that he was at the material time travelling from Embakasi on the way to town. That there was a heavy jam on the road and people were crossing the road. That he was moving at a slow speed when the appellant came running and hit into his motor vehicle and fell down. He received small bruises on the knee, hand and head. He took him to hospital and reported the accident to the police. He blamed the appellant for causing the accident.

14. The trial magistrate in his judgment stated that the treatment notes produced by the appellant from South B Hospital did not reveal any injuries as having been sustained by the appellant. That the injuries in the P3 form were at variance with the injuries listed in the plaint. Further that the doctor who prepared the medical report indicated that he examined the appellant on the 27th March 2012 yet the accident occurred on 2nd July 2009. The trial magistrate opined that the injuries contained in the medical report may have been for a different accident and not the one that involved the 2nd respondent herein. The magistrate consequently held that the appellant had failed to discharge his burden of proof against the 2nd respondent.

15. I have considered the pleadings, the evidence adduced before the trial court on how the accident occurred, the judgment of the trial court, and the submissions by counsels for the parties. The appellant in his plaint pleaded that he was lawfully walking along North Airport road when the 2nd respondent "negligently drove motor registration number KAS 807F thereby causing the same to collide into the plaintiff consequent thereof the plaintiff sustained serious injuries".

16. It is clear that the manner of negligence of the 2nd respondent was not pleaded. There was no allegation that the 2nd respondent veered off the road and hit the appellant. Neither in his pleadings nor in his evidence in court did the appellant state as to the exact spot where he was when he collided with the respondent`s motor vehicle. There was no evidence that he was off the road when he collided with the vehicle. It is further to be noted that the appellant pleaded that he collided with the 2nd respondent`s motor vehicle and not being knocked down by the vehicle. Despite the 2nd respondent stating in his witness statement that the appellant was crossing the road when he hit into his motor vehicle, the appellant did not endeavor to show where the point of impact was. He did not show that he collided with the motor vehicle off the road.

17. It was the case for the 2nd respondent that the appellant was crossing the road when the accident occurred. That he is the one who jumped onto his vehicle thus causing the accident.

18. In view of the fact that the appellant did not state either in his pleadings or in his evidence as to the exact spot where he was when he collided with the 2nd respondent`s motor vehicle, I am inclined to believe the 2nd respondent`s evidence that the appellant was crossing the road when he hit into the 2nd respondent`s motor vehicle. That he hit into the 2nd respondent`s motor vehicle shows that he was crossing the road without the requisite due care and attention. The appellant was liable for causing the accident. The question is whether the 2nd respondent contributed to the occurrence of the accident.

19. The 2nd respondent in his written statement though denying the occurrence of the accident stated that the accident was caused by the sole negligence of the plaintiff by walking or jumping into the lawful path of the 2nd respondent`s motor vehicle suddenly and without due indication dashing into the path of the said motor vehicle, walking without care and attention , failing to pay any regard or care to other road users generally and the driver of the said motor vehicle in particular, failing to have any or any due

regard to his own safety as a road user and also breaching and /or disobeying the Highway code. It is clear to me that these are general statements which do not disclose the exact manner the appellant was negligent in causing the accident. While the 2nd respondent says that there was a heavy jam and that pedestrians were crossing the road, he did not explain why he did not let the appellant cross the road safely. The 2nd respondent did not exonerate himself fully from contributing to the occurrence of the accident. I find him to have contributed in colliding with the respondent in that he did not let him cross the road among other pedestrians who were doing so. I assess his contribution at 20% while the appellant will be liable for 80%.

Quantum

20. It is trite law that where a trial court dismisses a suit on the basis that liability has not been proved, it is under duty to assess the amount of damages it would have awarded the plaintiff had the suit succeeded, see Court of Appeal's decision in Andrew Mwori Kasaya Vs Kenya Bus Service (2016) eKLR. The trial court in this case did not comply with that requirement.

21. The appellant testified as PW2 in the case and called one witness, Dr. Anthony Wandugu PW1 who prepared the appellant`s medical report. According to the medical report, the appellant had sustained cut wounds on the face, left wrist joint and left knee, trauma to the back and blood loss. The report indicates that the appellant was examined by the said doctor on 27/3/2012 when the doctor found him with tenderness in the knee and wrist joints with restriction of both active and passive movements, tenderness in the lower back with impairment of bending movements (the bending movement is positive) and scars of various measurement where there had been wounds with tenderness.

22. The prognosis of the doctor was that the injuries had resulted to scars which were uncosmetic, chronic disabling pains, headaches, permanent weakness of the left leg and left hand and permanent impairment of the bending movement.

23. It was the evidence of the appellant that he was treated at South B Hospital. During the hearing he produced a P3 form dated 19/9/2008 and a report from South B Hospital dated 11/8/2008 and entitled "To whom it may concern" which indicated that the appellant was treated at the said hospital after being involved in a road traffic accident. The report did not indicate the treatment given at the hospital nor the injuries sustained. The appellant did not produce the treatment notes made at the hospital.

24. The P3 form produced by the appellant indicates that he had sustained facial bruises, back pain and scars on the left wrist and left knee. The degree of injury was classified as harm.

25. It was the evidence of Dr. Wandugu PW1 that he examined the appellant on the 27/3/2012 which was nearly 4 years after the accident. It was his opinion that the appellant had suffered severe injuries.

26. The only medical reports placed before the court were the P3 form and the letter from South B Hospital dated 11/8/2008. The P3 form indicates that the appellant had sustained bruises, scars and back pain which injuries were classified as "harm". It is not clear from the P3 form as to the hospital where it was completed. Dr. Wandugu did not indicate the documents he relied on to prepare his report. His report indicated that the appellant had sustained cut wounds on the face, left wrist and left knee yet the P3 form noted those injuries as scars. Where from then did Dr. Wandugu get such information when the only document produced was the P3 form that did not have those kinds of injuries?

27. The appellant in his evidence in court stated in cross-examination that he did not attend any other hospital after being treated at South B Hospital. The letter from the stated hospital suggests that he was treated on the date of the accident and discharged. This is an indication that he had not suffered serious

injuries. This is proven by the fact that he did not seek any further treatment after being discharged from the said hospital. How then did injuries that were indicated in the P3 form as simply "harm" transform into such severe injuries as claimed by Dr. Wandugu? I am not convinced that the findings in the medical report of Dr. Wandugu are reliable. They are not backed by treatment notes from the hospital where the appellant was treated. In the premises I decline to rely on the said report in making an award for damages. I find that the appellant sustained injuries as stated in the P3 form, .e,:Bruises on the face;Back pains;Scars on the left wrist, andScars on the left knee.

28. In my consideration, these were soft tissue injuries. There was no evidence that they were debilitating in any way.

29. It is a principle of law in awarding damages that comparable injuries ought to be compensated by comparable awards. In the case of Stanley Maore vs Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 (2004)eKLR, the Court of Appeal stated that:-

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."
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> Similarly, in Simon Taveta v Mercy Mutitu Njeru [2014] eKLR it was held that: –
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> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

30. I have considered the awards in the following cases. In George Mugo & another V AKM (minor suing through next friend and mother of A.N.K [2018], Kemei J substituted an award of Kshs. 300,000 with an award of Kshs. 90,000 for soft tissue injuries to the left shoulder, blunt chest injury, bruises to the left wrist and blunt injury to the left arm. In Ndung'u Dennis vs Ann Wangari Ndirangu & Anor (2018) eKLR the claimant sustained injuries on the right lower leg and bruises on the back. An award of Kshs. 300,000/= was reduced to Kshs. 100,000/= on appeal. In Civil Appeal No. 54 OF 2016: Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR, the respondent suffered bruises on the neck, tenderness on the right leg, blunt injury to the chest and both hands, back and chest pains. The trial court awarded Kshs. 300,000/= which was reduced to Kshs. 100,000/= on appeal.

31. Having regard to the above authorities, I award the appellant Ksh.100,000/= in general damages for pain and suffering.

Disposition

32. The court finds that the appellant was largely to blame for causing the accident while the 2nd respondent contributed to the occurrence of the accident. The finding on liability by the trial court is therefore set aside and substituted with a finding that the appellant is to bear 80% liability while the 2nd respondent is to bear 20% liability.

33. The court awards the appellant Ksh.100,000/= in general damages, which on taking into account his liability of 80% leaves him with an award of Ksh.20,000/=. I accordingly enter judgment for the appellant in the sum of Ksh.20,000/=.

34. Since the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr Githinji for Appellant

Miss Wangari holding brief Mr C M Kihara for Respondent

Court Assistant – Amina

30 days Right of Appeal.