Wekesa & another v Tala (Civil Appeal E071 of 2022)
[2024] KEHC 11762 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E071 OF 2022

REA OUGO, J

SEPTEMBER 26, 2024

BETWEEN

RUTH WEKESA ..... 1ST APPELLANT

GEORGE WEKESA ..... 2ND APPELLANT

AND

HENRY NYONGESA TALA ..... RESPONDENT

(Being an appeal from the judgment made by Hon. Dennis Ogal (SRM) delivered and dated 27th July 2022 in Kimilili CMCC No 13 of 2020)

JUDGMENT

1. The appeal filed before this court challenges the findings of the trial magistrate on liability and quantum. The respondent who was the plaintiff at the subordinate court claimed that on 21/11/2019 he was sitting on his motorcycle, parked beside the road, in the Wabukhoyi area along Kitale-Webuye road. The appellant's motor vehicle, KAK 241W, driven carelessly and negligently lost control, veered off the road and knocked the respondent thereby sustaining injuries.

2. The appellants denied causing the accident and averred that if the accident did occur, the same arose as a result of the contributor negligence of the respondent.

3. A trial ensued and, in the end, the trial magistrate found that the appellants were solely to blame and entered judgment in favour of the respondent:

    a. General damages Kshs 1,200,000/-

    b. Special damages Kshs 6,550/-

    c. Future medical expenses Kshs 150,000/-

    Total Kshs 1,356,550/-

4. The appellants dissatisfied with the judgment have filed this instant appeal on the following grounds:

    1. The learned magistrate erred in law in awarding damages that were too high thereby arriving at an inordinately high award to the respondent without any justification or basis of the same.

    2. The learned magistrate erred in fact and law by failing to take into account relevant factors and as a result ended up with a wrong decision on the award of damages.

    3. The learned magistrate misapprehended the evidence on record, the consequence of which he reached a wrong decision on the award of damages.

    4. The learned magistrate misapprehended the evidence on record, the consequence of which he reached a wrong decision.

    5. The learned magistrate erred in fact and law by arriving at conclusions on liability based on assumptions as opposed to evidence and the law.

    6. The learned magistrate erred in fact and law by making an award of general damages which is so inordinately high so as to amount to a wholly erroneous award.

    7. The learned magistrate erred in fact and law by taking into account irrelevant and extraneous factors leading to an excessive award to the respondent.

    8. The learned magistrate erred in fact and law and proceeded on wrong principles when assessing damages to be awarded to the respondent under future medical expenses if any and failed to apply applicable precedents and tenets of the law.

    9. The Honourable Magistrate erred in law in relying heavily on the respondent's submissions and ignored the appellants submissions, thus grossly misdirecting himself and ignored the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the appellants and consequently coming to a wrong conclusion on the same.

    10. The honourable magistrate erred in fact in failing to take into account the authorities cited on behalf of the appellants with regard to damages awardable to the respondents under liability and award on general damages.

    11. The learned magistrate erred in fact and law by proceeding to announce judgment in favour of the respondent in total disregard to the appellant's submissions.

5. The appellants seek that the judgment of the subordinate court be set aside and substituted with a proper finding of this court.

6. The appeal was canvassed by way of written submissions and both parties have complied by filing their respective submissions.

7. The appellant submits that the burden of proof was on the respondent to prove his case but he failed to discharge that burden. There were no sketch maps produced and the police officer who testified confirmed that the driver of the vehicle was not charged. The evidence is clear that the respondent was aboard the motorcycle on the side of the road talking to friends when the accident occurred. The respondent had a responsibility to other road users to ensure his safety and he ought not to have been in an undesignated parking area chatting with his friends without paying attention to other road users. The respondent was the author of his own misfortune and ought to have been held 100% liable.

8. In the alternative and without prejudice, the appellant submits that given the respondent had intentionally put himself at risk, the trial court ought to have apportioned liability at 50:50. Reliance was placed in the holding of the court in *Rentco East Africa Ltd v Dominic Mutua Ngozi* Civil Appeal No 45 of 2020:

> "It was not disputed that the respondent and another person were pillion passengers of the said motorcycle. The law does not permit more than one pillion passenger to be carried on a motorcycle. By riding on the said motorcycle against the law, the respondent exposed himself to danger. Such conduct cannot go uncondemned and it should not be rewarded. Accordingly, the respondent ought to shoulder some blame for reckless conduct. Accordingly, I find that the appellant ought not to have been found 100% liable. I set aside that finding and substitute therefore 70% liability for the driver of the motor vehicle and find that respondent 30% liable."

9. On general damages, the appellant submits that an award of Kshs 400,000/- would have been reasonable in the circumstances. They relied on the case of *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where the court awarded Kshs 450,000/- to a respondent with similar injuries. In *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR the court awarded Kshs 500,000/- to a party who sustained similar injuries with 30% permanent disability and unable to walk without support. In *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR Kimondo J. reduced the award of Kshs 800,000/- to Kshs 450,000/- for similar injuries.

10. On future medical expenses, it was submitted that the respondent in his plaint sought Kshs 150,000/- for removal of the metal plate inserted during open reduction and internal fixation. The Medical report by Dr. Joseph Sokobe estimated the costs to be Kshs 150,000/-. However, the medical report by Dr. James Obondi estimates the cost at Kshs 100,000/- at a mission hospital where the plaintiff was treated. It was submitted that Kshs 100,000/- would be reasonable for future medical expenses.

11. The respondent in opposition submits that although the 2nd appellant alleged that he was driving at moderate speed, he was not able to control the vehicle by bringing it to a stop and therefore applied emergency brakes to avoid hitting a dog thereby losing control and swerving to the respondent who was off the tarmac road. In the event the appellant's speed was moderate, the respondent would not have sustained serious injuries. The road was clear (with no other vehicle on the road) so the 2nd appellant failed to be on proper lookout. They urged the court to uphold the decision of the trial magistrate on liability.

12. On general damages, he cited the case of *Benard Bisonga Sungura & another v Harrison Ogendo Opiyo* (2020) eKLR, HCCA No 115/2015 where the respondent suffered head injuries, injury to the cervical spine C2-15, fracture of the tibia fibula bones and the award of Kshs 1,200,000/- was upheld. In *David Muriungi Daniel & another v Moses Githongo Ndereva* (2017) eKLR the court retained an award of Kshs 1,400,000/- for injuries to the plaintiff therein sustained subluxation of the cervical spine C3 to C5, displaced fracture of the clavicle and had developed a permanent deformity to the pelvis causing him to have a waddling gait while walking.

13. On future medical expenses, Dr Sokobe confirmed that the respondent had implants that needed to be removed at the estimated cost of Kshs 150,000/-. Dr Mohammed (PW3) confirmed that the costs of removal cost between Kshs 100,000/- to Kshs 140,000/-.

Analysis and Determination

14. This being a first appellate court, I am guided by the principles set out in *Selle and another v 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."

15. Henry Nyongesa (PW1) testified that he was standing next to the road when he was hit by the vehicle. He testified that he was talking to his neighbour while sitting on the motorcycle. He explained that he was not on the road and the appellant's driver did not hoot. He testified that he did not anticipate the accident to occur off the road. Suddenly the appellant's vehicle heading to Webuye lost direction and headed towards PW1. Before he could escape, the vehicle hit him and he fell on the ditch.

16. George Wekesa (DW1) adopted his witness statement dated 9/12/2020. He testified that upon passing Kamkuywa police post, he was driving at 30 km/hr and noticed the respondent sitting on his motorcycle which was partly parked on the road talking to a lady. Suddenly a dog appeared on the road, and in a bid to avoid hitting the dog, he swerved and applied emergency brakes while hooting to alert the motorcycle rider. Unfortunately, DW1 veered off the road towards the ridder hitting him.

17. The fact that DW1 acknowledged that he veered off the road and hit the respondent indicates that the respondent was not on the road. In *Masembe v Sugar Corporation and another* [2002] 2 EA 434, it was held that:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

18. In this case, it is clear that the appellant was concerned with not hitting the dog and despite having seen the respondent on the side of the road, he swerved towards him thereby hitting him. It was the appellant's case that he was driving at 30km/hr, however, if that was so, he would have brought the vehicle to a stop when he saw the dog. The accident occurred on the side of the road after Dw1 left his lane. Therefore, I find no error with the holding that the appellant was 100% liable for the accident.

19. I now turn to consider the damages awarded. In an appeal against the assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

> " 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 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."

20. The treatment notes from Friends Lugulu Mission Hospital show that the respondent sustained a fracture of the tibia fibula and these injuries were also confirmed by Dr Mohammed Adam (PW3), a doctor at Lugulu Mission Hospital. PW1 testified that he was referred to Life Care Hospital where the radiology report revealed that he sustained a C5 teardrop fracture and noted that there was loss of normal cervical lordosis. According to the medical report by Dr. Joseph C. Sokobe the respondent sustained the following injuries:

    1. Head injury with loss of consciousness
    2. Cut wound on the upper lip
    3. Bruises and lacerations on the forehead
    4. Fracture of C5 (tear drop fracture 5th Cervical vertebrae)
    5. Fracture of the left tibia/fibula
    6. Cut wound on the left elbow
    7. Blunt injury to both shoulders

21. Dr Sokobe formed the opinion that the respondent sustained both soft and bony tissue injuries and will need the implants removed at an estimated cost of Kshs 150,000/-. The respondent in my view proved that he sustained the injuries listed in his plaint. The medical report of Dr. James Obondi Otieno also confirmed that the respondent sustained soft tissue injuries, fractures of the cervical spine and left tibia fibula.

22. The appellants have argued that the future medical expenses awarded were too high. They relied on the medical report of Dr. James Obondi Otieno who believed that plate removal would cost Kshs 100,000/- at a mission hospital. In my view, it would be unreasonable to assume that the respondent would undergo the procedure at the mission hospital, as he has the right to seek medical treatment at a facility of his choice. The respondent produced the medical report of Dr Sokobe which estimated the cost of future medical expenses at Kshs 150,000/-. Future medical expenses were pleaded and proved.

23. The appellants in their submissions cited various cases and claimed that the injuries sustained therein were similar to those suffered by the respondent. However, the submissions of the appellants were not accurate. In *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR the plaintiff sustained a compound fracture of the right femur and fractures of the metacarpal bones and was awarded Kshs 450,000/-. In *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR the 3rd respondent sustained soft tissue injuries, fracture of four upper teeth, dislocation on the left shoulder and fracture of the right tibia and fibula where disability was assessed at 30% and he was awarded Kshs 500,000/-. In *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR the respondent had two loose teeth; fractures of the 4th and 5th left ribs; blunt trauma to the spinal column and right scapula area; and, dislocation of the left shoulder joint and was awarded Kshs 450,000/-.

24. In determining the award of damages, the court has to rely on recent comparable awards and this was appreciated by the Court of Appeal in *Mbaka Nguru and another v James George Rakwar* NRB CA Civil Appeal No 133 of 1998 [1998] eKLR where it was held that:

> "The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court

has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

25. The court in *Palak International Limited & another v Langat* [2022] KEHC 10999 (KLR) upheld the award of general damages of Kshs 1,500,000/- where the claimant sustained a fracture of C5, C6 with spondyloisis cord compressed. Having considered the respondent's injuries and recent comparable awards, I find no fault with the trial magistrate's decision on damages.

26. In conclusion, I find no merit in the appeal and the same is dismissed. The respondent shall have the cost of the appeal,

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Nafula h/b Mr. Atundo -For the Appellant

Miss Soita - For the Respondent

Wilkister -C/A