Muhiu v Obare (Civil Appeal E212 of 2022)
[2024] KEHC 11225 (KLR) (Civ) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E212 OF 2022

JN NJAGI, J

SEPTEMBER 25, 2024

BETWEEN

STEPHEN KIMANI MUHIU ..... APPELLANT

AND

ALFIN OBARE ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon.D. W. Mburu, SPM, in Milimani Civil Suit No. 2720 of 2019 delivered on 18/3/2022)

JUDGMENT

1. The respondent herein instituted a suit against the respondent in a claim of general and special damages after he was knocked down and injured in a road traffic accident involving a motor vehicle driven by the appellant herein. The respondent was a pedal cyclist at the time of the accident. He blamed the appellant for careless driving thus causing the accident. The appellant denied the claim. After a full trial, the trial court found the appellant to have been wholly to blame for the accident and awarded the respondent Ksh.900,000/= in general damages. The appellant was aggrieved by the judgment of the court and lodged this appeal.

2. The grounds of appeal are that:

    a. That the learned trial magistrate in the matter herein delivered judgment on 18th March 2022 in favor of the respondent thus contrary to the law and facts availing before the Honourable court.;

    b. That the learned trial magistrate erred in law and fact in finding that the appellant was 100% liable for the accident;

c. That the learned trial magistrate erred in law and in fact in finding that the appellant was negligent or at all in the absence of any concrete evidence to demonstrate the same;

d. That the learned trial magistrate erred in law and fact in failing to appreciate the defense of the appellant and thereby arriving at an erroneous conclusion of condemning the appellant to a 100% liability and no particulars of negligence had been proved at all;

e. That the learned trial magistrate erred in law and fact in failing to apportion liability against the appellant and the plaintiff despite the occurrence book being read in court indicating the respondent was to blame.

f. That the learned trial magistrate erred in fact and law in finding that the respondent was entitled to General Damages and loss of amenities of Kshs. 900,000/= that was too high in view of the fact that compared to the injuries suffered by the respondent;

g. That the learned trial magistrate erred in fact and law in finding that the respondent was entitled to general damages for loss amenities that not been specifically pleaded or proved in the amended plaint;

h. That the learned trial magistrate eared in law and fact in failing to appreciate the principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving erroneous finding/conclusion in particular relating to damages;

i. That the learned trial magistrate erred in law and fact in failing to appreciate that the respondent's pleadings, submissions and the evidence tendered in support thereof was incapable of sustaining the award of damages;

j. That the learned magistrate erred in law and fact inn entering judgement in favor of the respondent against the appellant in spite of the respondent's miserable failure to establish her case more specifically on quantum.

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

Appellant's Submissions

4. The appellant submitted that he called the investigating officer who stated that he was informed by the driver of the accident motor vehicle that the cyclist was to blame for causing the accident. That it was clear that the respondent had not proved the case on a balance of probabilities. The appellant urged the court to find that the respondent was wholly to blame for the accident and dismiss the suit in its entirety.

5. On damages the appellant submitted that according to the plaint the respondent sustained: pain on the right ankle and recurrent abdominal pain. That the P3 form and medical report from Dr. Cyprianus Okore dated 20/3/2019 listed the injuries as an ankle fracture. However according to the treatment notes from Kenyatta Hospital, the injuries sustained were abdominal injuries and ankle dislocation. The appellant thus submitted that the award of Kshs. 900,000/= in general damages was inordinately high. They urged that an award of Kshs. 250,000/= would be sufficient. The appellant relied in the following cases to buttress his position;*Richard Gituku Gakinya v Anthony Kibirii Waithaka* (2021) eKLR wherein the respondent who sustained right ankle dislocation and soft tissue injuries was awarded Ksh. 300,000/=.*Platinum credit ltd & another v Erick Oloo Okello* (2021) eKLR where the respondent was awarded Kshs. 200,000/= for sustaining dislocation of the right shoulder, dislocation of the right ankle joint, chest injury, blunt injury on the right pelvic bone; and blunt injury.

Respondent`s Submissions

6. The respondent submitted that he adduced evidence in court showing that the accident motor vehicle was speeding at the time of the accident. That it lost control and caused the accident. That he called a police officer in the case who confirmed that the appellant was to blame for the accident.

7. It was submitted that the respondent never gave evidence in court but instead called a police officer who gave heresy evidence that he was informed by the driver of the vehicle that the respondent was to blame for the accident. The respondent submitted that the case was proved on a balance of probabilities. He urged the court not to disturb the finding of the trial court on liability.

8. On damages, the respondent submitted that the evidence presented before the trial court showed that he sustained a fracture of the right medial malleolus and blunt abdominal injury. That the injuries were confirmed by Dr. Okere who opined that the injuries were grievous in nature and assessed the degree of permanent incapacity at 10%. That the treatment notes confirmed the injuries.

9. The respondent relied on the case of *John Kuria Mbure v Magari Hire Purchase Ltd & 2 others* (2019 eKLR where Ksh.2,000,000/= was awarded for similar injuries as in the instant case. The respondent urged the court to uphold the award of the trial court.

Analysis and Determination

10. This court being the first appellate court in the matter, it is my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I am in this regard guided by the pronouncement in the case of *Selle v Associated Motor Boat Co Ltd* [1965] E A 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify.

11. The appeal is both on liability and quantum.

Liability

12. The respondent pleaded in his plaint that on the 6th March 2019 he was lawfully cycling along Githurai round about when the appellant`s motor vehicle Registration No. KBR 604B was managed and /or controlled so negligently and carelessly that it caused an accident as a result of which he sustained serious injuries. In his evidence in court he stated that the motor vehicle hit him from behind as it tried to overtake him. It was his evidence that the vehicle was speeding.

13. Though the appellant denied the purported negligence on his part and in the alternative pleaded that the accident was caused solely and/or substantially contributed to by the respondent`s own negligence, he did not testify in the case. He instead called the police officer who investigated the case, DW1. The officer however never indicated that he visited the scene. He said that he was informed by the driver of the motor vehicle that the pedal cyclist was hanging on the rear of the lorry.

14. It is trite law that where a party fails to adduce evidence, its pleadings remain mere allegations which have not been proved. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of

the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

15. The respondent herein adduced evidence that the appellant`s motor vehicle was speeding and hit him from behind as its driver tried to overtake him. This evidence was not controverted as the appellant did not testify in the case. I therefore find that it is the appellant who was to blame in causing the accident. The finding on liability by the trial court is therefore upheld.

Quantum

16. In *Butt v Khan* (1981) KLR 349, it was held that: -

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".

17. The plaintiff pleaded the following injuries in his amended plaint:Blunt abdominal injuryFracture of the right medial malleolus

18. Similar injuries were captured in the medical report of Dr. Okere who assessed the degree of permanent incapacity at 10%.

19. The respondent produced the P3 form and treatment notes from Kenyatta National Hospital. The P3 form indicated the injuries sustained as blunt abdominal injury and fracture of the medial malleolus. It is not clear the hospital where the P3 form was completed at.

20. The treatment documents from Kenyatta National Hospital where the respondent was treated showed that he had sustained ankle dislocation and blunt abdominal injury. There was no indication from the documents from that hospital that the respondent had suffered any fracture. The finding by D. Okere of a fracture injury is not credible as it is not supported by the treatment notes from Kenyatta National Hospital. I find that the respondent suffered injuries as noted in the treatment documents from Kenyatta National Hospital - ankle dislocation and blunt abdominal injury.

21. The trial court awarded damages for fracture of the right medial malleolus without interrogating whether the said injuries were actually sustained despite contradictory findings in the medical reports of the injuries suffered by the respondent. I find that no fracture injuries were sustained. The trial court used the wrong injuries in assessing the damages and thus arrived at an erroneous estimate of damages. The injuries suffered were ankle dislocation and abdominal pains.

22. For the stated injuries, I have considered the awards in the following cases:

> In *Purity Wambui Muriithi v Highland Mineral Water Company Ltd* [2015] eKLR the court awarded Kshs.700,000/- that was on appeal was reduced to Kshs.150,000/- for the Plaintiff who had sustained injuries to the left elbow, public region, lower back and right ankle.
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> In *Richard Gituku Gakinya v Anthony Kibirii Waithaka* [2021] eKLR, the respondent sustained deep cut wound on the right supra – orbital region and right ankle joint dislocation. The court on appeal reduced the award of the trial court from Ksh.400,000/= to Ksh.300,000/=-

23. Taking into consideration the awards in the above authorities, I award the respondent Ksh.250,000/= in general damages. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

No appellant for Appellant

Mr Kulechofor Respondent

Court Assistant – Amina

14 days Right of Appeal.