Ndegwa & another v Mueni (Civil Appeal E209 of 2024) [2024] KEHC 11832 (KLR) (Civ) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E209 OF 2024

AM MUTETI, J

SEPTEMBER 25, 2024

BETWEEN

KIMANI GICHUKI NDEGWA .... 1ST APPELLANT

STEPHEN KIMANI .... 2ND APPELLANT

AND

JANE MUENI .... RESPONDENT

(Being an appeal and cross appeal on the Judgment and Decree of the Senior Resident Magistrate Hon. MS Christine A. Ogweno delivered on the 18th January 2024 in Milimani MCCC No. E9380 of 2021)

JUDGMENT

Introduction

1. The appellants in this appeal have appealed to this Court against the decision of the Learned Honourable Magistrate on quantum only. The Respondent on the other hand has cross-appealed on the issue of liability only.
2. The appellants contend that the Learned Honourable Magistrate was wrong in reaching a determination on the injuries suffered by the Respondent while ignoring the second medical report prepared by their doctor.
3. Further, the appellants argue that the sum of Ksh. 600,000 awarded as general damages was excessive in the circumstances of the case.

4. The appellants also contended that the award for future medical expenses to the tune of Ksh. 80,000 was made in error since according to the appellants the Respondent had fully recovered from the injuries.

5. The appellants maintained that the Learned Honourable Magistrate was wrong in failing to subject the award for special damages to the liability ration of 70:30.

6. Finally, the appellants urged the Court to find that the Respondent had not proved the case before the trial Court on quantum thus the damages awarded ought to be reviewed.

7. The appellants faulted the Magistrate for failing to consider their submissions before reaching her decision.

8. The Respondent on the other hand cross-appeals against the appointment on liability at 70:30 in her favor.

9. She urges this Court to find that there was no justification for such a finding on liability in view of the evidence adduced at the hearing.

10. The Respondent therefore seeks the setting aside of the order apportioning liability.

11. The Respondent also seeks the costs of appeal and interest on the sum awarded till payment in full.

Analysis

12. The accident giving rise to the claim happened on the 3rd March 2021 along Gitanga Road, Nairobi.

13. The Respondent was a pedestrian along the said road when she was hit by motor vehicle registration No. KAW 066Q driven by the 2nd appellant whereas the same was registered in the name of the 1st Appellant.

14. The Respondent called 3 witnesses in support of her case.

15. According to the evidence the Respondent was waiting to board a vehicle on her way home when she was suddenly hit by a matatu that was headed to Kawangware. The motor vehicle according to her statement was KAW 066Q which lost control veering off the road and hit her.

16. The Respondent sustained injuries particularized as here under:-

    i. Bruises on the forehead.

    ii. Scars on her upper lip.

    iii. Loss of six teeth.

    iv. Injuries on the elbow.

    v. Tenderness on the left hand and

    vi. Laceration on the right foot

17. The respondent's evidence on injuries was supported by PW2 DR Wokabi who produced the medical report.

18. The Police Abstract was produced by PW3 CPL George Rapero of Muthangari Traffic Police. In his evidence the officer indicated that the motor vehicle was to blame for the accident. I suppose he must have meant the driver of the motor vehicle KAW 066Q.

19. The driver of the motor vehicle gave evidence for and on behalf of the two appellants. He testified that the Respondent was to blame.

20. The driver was clear that the accident happened at a shopping center and according to him the vehicle could not stop even by application of emergency breaks.

21. The duty of this Court as a first appellate Court is well enunciated in the celebrated case of *Selle & Another Vs Associated Motor Boat Co. Ltd* [1968] E.A 123.

22. The Court is not bound by the conclusions drawn by the Learned Honourable Magistrate following his analysis of evidence.

23. I have independently reviewed the evidence and from my analysis I have come to the conclusion that on the issue of quantum, the learned Honourable Magistrate was not fair to the Respondent in apportioning liability at 70:30.

24. The accident happened at a shopping center according to the driver 1st appellant.

25. If indeed that was the situation his evidence confirms the version of the Respondent that she was waiting to board a vehicle.

26. The 1st appellant testified that even if he had applied emergency brakes, the vehicle would not have stopped. It follows therefore that the driver must have been moving at a high speed which explains why the vehicle veered off and hit the Respondent.

27. The *Traffic Act* Cap 403 of the Laws of Kenya under Section 42 (3) provides:-

> “ No person shall drive, or being the owner or person in charge of a motor vehicle permit any other person to drive , any vehicle at a speed exceeding Fifty kilometers per Hour or on any road within the boundaries of any trading center township , municipality or city…”

28. The speed limit is intended to ensure that drivers are able to stop at any moment within such centers or towns to avoid causing accidents since it is common knowledge that in urban centers pedestrians would be using the roads as well.

29. It is therefore not understandable how a driver adhering to the provisions of the law would not be able to stop his vehicle by applying emergency brakes if the situation called for that.

30. For the 1st appellant to have been unable to do so, he must have been moving at a speed higher than prescribed under the law.

31. The 1st appellant alluded to there not having been a zebra crossing at the point where the accident occurred. That would have been a relevant consideration if at all the Respondent was said to have been crossing the road.

32. In this case no such evidence was adduced therefore the appellant cannot help his case by clinging on to that fact.

33. The witness called by the Respondent from the Traffic department of the National Police Service placed the blame on the driver of the motor vehicle.

34. It therefore baffles me why the Learned Honourable Magistrate decided to apportion blame between the Appellants and the Respondents.

35. In their submissions the appellants have argued that since the driver was not charged with a traffic offence then the Respondent did not adequately prove that the 1st appellant was to blame for the accident.

36. It must be understood that the fact of one not being charged with a traffic offence cannot by itself absolve a driver from blame.

37. The failure to change drivers for traffic offences is purely a matter for the police and not victims of accidents.

38. The decision to charge is not a matter within the control of a victim of an accident. The police may have their own reasons for not doing so. It cannot be the business of the Court to speculate as to the price why they chose not to charge. To imagine that the only reason for that not to have been, done even after the police as per PW3 had found the driver to blame, would be to venture into speculation which is not the function of the Court.

39. The appellants had the opportunity to elicit the reason from PW3 when he testified and blamed the 1st Appellant for the accident but did not.

40. The decision of *Sally Kibii & Another Vs Francis Ogaro* [2012] eKLR which the appellants relied on is clearly distinguishable. In that case the plaintiff had not called any evidence to prove liability. In the present case the Respondent and PW3 gave evidence that put blame squarely on the 1st appellant.

41. The appellants urged the Court not to interfere with the finding on liability which in my view is a position that would mean therefore that the appellants do agree that the driver was to blame to a degree of 70%. That is a concession that cannot be ignored.

42. As earlier on stated I do not find any evidence tendered by the appellants in their defence to make the Respondent shoulder liability at all.

43. The cross appeal on liability is therefore merited and is hereby allowed. The learned Honourable Magistrate's decision on liability is thus set aside and substituted therefore with a finding of 100% liability against the appellants jointly and severally.

Quantum

44. On quantum, the Court appreciates that the Learned Honourable Magistrate arrived at the figure by way of exercising her discretion on account of the evidence presented before her .

45. To interfere with exercise of discretion, this Court must be persuaded that the learned Honourable Magistrate misdirected herself on material facts or misapplied known principles of law in the assessment of damages.

46. This Court unlike the magistrate did not have the advantage of seeing and hearing the witnesses thus due allowance is to be made in that regard in drawing its conclusions. See *Mbogo Vs Shah* [1968] EA 93.

47. The appellants in their submissions have faulted the learned Honourable Magistrate for awarding a figure that was inordinately high and failing to subject the total award to the 70:30% appointment.

48. This Court agrees with the appellants that where liability is apportioned between the parties, that should apply to the total sum awarded.

49 It would be improper for a Court to exclude special damages or even costs for future medical care from the apportionment. It is important to mention here that the question of liability extends to all limbs

of the award since the plaintiff would not in any event have suffered such damage if at all the accident never occurred.

50. This Court adopts the reasoning in *Njoki Vs Gitonga* (Civil Appeal E078 of 2021) [2024] KEHC 2497 (KLR) (CIV) 12th March 2024 Majanja , J.

51. However, as indicated above on my finding regarding liability, the appellants are to bear 100% liability. Thus there would be no adjustment to decretal sum.

52. The figure of Kshs. 600,000 as contested by the appellants for they hold the view that the same is excessive considering other comparable cases. The appellants propose an award of Kshs. 300,000 in general damages.

53. Whereas it is true that no amount of money can restore the physical frame of an individual who has fallen victim of an accident, it should be remembered that money can assist in acquiring implants that can bring one's physical frame closer to what it was before the accident.

54. In this case the Respondent would require dentures in place of the teeth lost as result of the accident.

55. The appellants must acknowledge that the respondent is a lady and looks matter to them. In fact any slight thing that interferes with their body frame causes a great discomfort to them. Of course that is not meant to say that men do not care about looks.

56. Potter , JA in *Rahima Taya & Another Vs. Anna Mary Kinaru* [1987-88] 1 KAR 90 stated:-

> "I would commend to trial judges the following passage from the speech of Lord Morris of Borthy-Gest in the case of West (H) & Son Ltd Vs. Shepherd [1964] A.C 326 at Page.345 :- But 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. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."

57. This Court fully agrees with the position taken by Porter, JA and only adds that whereas awards must be comparable for comparable injuries, Courts must also take into account inflationary trends in assessing damages to avoid making awards that are not economically comparable given the prevailing economic situation at the time of making an award.

58. It should not come as a surprise today that a figure that Courts would have awarded in 1987 when Potter, JA recommended the above quoted passage, such an amount today if granted would be laughable due to devaluation in currency.

59. The appellants have placed reliance on the case of N*ational Industrial Credit Ltd & 2 Others Vs. MNO (Minor suing through next of Friend and Mother FNM)* Civil Appeal No.E035 of 2023 [2024] KEHC 3824 (KLR) (18th April 2024) in which a sum of Kshs.250,000 was awarded in general damages for comparable injuries.

60. I have looked at the medical reports and in my view the award for Kshs. 600,000 is not inordinately high to justify the interference with the exercise of discretion by the learned Honourable magistrate

61. The figure of Kshs. 80,000 in respect of future medical expenses was not justified since there was no evidence led to prove that the respondent would require to undergo future medication requiring such an expense.

62. In the end, I find that the appellants appeal lacks merit and is therefore dismissed in respect of quantum.

63. It is therefore ordered that:-

a. The cross appeal on liability is allowed and liability is to be borne 100% by the appellants.

b. The sum of Kshs. 80,000 awarded as cost for future medical expenses is set aside.

c. Special damages Kshs.550.

d. General damages Kshs. 600,000.

e. Costs of this appeal and the suit below to be borne by the appellant.

f. Interests at Court rates on (c) (d) and (e) until payment in full.

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

HON. A.M MUTETI

JUDGE

In the presence of

Kiptoo: Court Assistant

Ms. Koko for the Respondent

Ojong'a for the Appellant

Appellant