Brinks Security Services Limited & another v Karuga (Civil Suit E1481 of 2023) [2024] KEHC 13492 (KLR) (Civ) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E1481 OF 2023

MA OTIENO, J

OCTOBER 31, 2024

BETWEEN

BRINKS SECURITY SERVICES LIMITED ..... 1ST APPELLANT

BERNARD KIMUTAI ROTICH ..... 2ND APPELLANT

AND

EDWARD MWAI KARUGA ..... RESPONDENT

(An appeal from the Judgement and Decree of Honourable Ruguru N delivered on 24th November 2023 in the Milimani CMCC No. E1068 OF 2021)

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 24th November 2023 in the Milimani CMCC No. E1068 of 2021 in which the Respondent sued the Appellants seeking compensation for the injuries suffered in a road traffic accident which occurred on 13th April 2023 along Forest Road involving the 1st Appellant's motor vehicle registration No. KCS 039Q then being driven by the 2nd Appellant.

2. In a plaint dated 28th June 2021, the Respondent (then a Plaintiff) pleaded that on the date of the accident, he was lawfully crossing Forest Road when the 2nd Appellant negligently drove the 1st Appellant's motor vehicle registration No. KCS 039Q, causing the vehicle to lose control and knock him down, thereby causing the Respondent severe bodily injuries.

3. On 24th November 2023, the trial court rendered its decision in the dispute and found the 2nd Appellant wholly liable in negligence, with the 1st Appellant being vicariously liable. A sum of Kshs. 800,000/-

was consequently awarded by the trial court in general damages with a further sum of Kshs. 3,550/- being awarded for special damages.

4. Costs of the suit as well as interest at court rates were awarded to the Respondent by the trial court.

The Appeal

5. Aggrieved by the decision of the trial court, the Appellants vide their memorandum appeal dated 22nd December 2023 lodged an appeal to this court, raising nine (9) grounds of appeal that; -

    i. The learned trial magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

    ii. The learned trial magistrate erred in law and in fact in failing to attach due weight to the Appellant's evidence and submissions and authorities attached thereto.

    iii. The learned magistrate erred in law and fact in apportionment of liability contrary to the evidence in court.

    iv. The learned trial magistrate erred in law and fact in assessing and awarding general damages and special damages wherein the respondent failed to prove his case.

    v. The said award is in circumstances so inordinately high that it amounts to wholly erroneous estimate of the damages suffered by the respondent.

    vi. The said award is altogether disproportionate and not in line with other comparable awards made in respect of similar injuries.

    vii. The learned trial magistrate erred in both in law and in fact by giving a very high award in quantum contrary to the evidence given in court.

    viii. The learned trial magistrate award lacked legal and factual basis and also amounted to erroneous estimate of damages due in the particular case and was manifestly excessive.

    ix. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unstained in law.

6. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 29th August 2024 whilst that of the Respondent is dated 5th September 2024.

Appellant's submissions

7. The Appellants submitted that the trial court, in reaching its finding on liability, failed to appreciate that the Respondent had not proved its case to the standards required under section 107 (1) of the *Evidence Act*. According to the Appellants, it is the Respondent was liable in negligence since he was crossing the road at an undesignated place and that he (the Respondent) was obscured by another motor vehicle.

8. The Appellant asserted that from the facts of the case and the testimonies submitted by both parties at trial, it is the Respondent who exposed himself to obvious harm by choosing to cross the road at an undesignated place contrary to the traffic rules and the Highway Code.

9. Citing the decision in the case of Samuel Kimani & Another vs Mary Wanjiku Kamau & Another [2019] eKLR, the Appellants submitted that the trial court failed to appreciate the principle that pedestrians are responsible for their own safety as well as the safety of other road users and that they should therefore not cross roads recklessly.

10. The Appellants maintained that the Respondent had sufficient time and ability to avoid the accident but failed to make any attempt to do so despite having knowledge of the road traffic rules.

11. In the premises, the Appellants submitted that based on the evidence on record, the trial court erred in finding the 2nd Appellant wholly liable for causing the accident. That in any event, where accident happens in circumstances similar to the instant case, courts have generally held parties equally liable for causing the accident. The case of *Holistic Educational Trust v Mulatya alias Musau Mulatya Samson & another (Civil Appeal 035 of 2022*) [2024] KEHC 3787 (KLR) (5 April 2024) (Judgment) was cited by the Appellants in support of this argument.

12. On the quantum of general damages, the Appellants submitted that the amount of Kshs 800,000/- awarded by the trial court was high and excessive in the circumstances and that the same did not take into account the injuries sustained by the Respondent as a result of the accident.

13. Relying on the principle of restitutio in integrum, the Appellants submitted that an award for bodily injuries, as was the case herein, is only intended to be compensatory in nature and therefore a Plaintiff should receive in monetary terms no more and no less than the loss actually suffered.

14. Citing among others the decision in Bolpak Trading Co Ltd & another v Gilbert Onyango Odie [2022] eKLR, the Appellants maintained that an award of Kshs. 300,00/- would in the circumstances of the case, be sufficient to compensate the Respondent for the injuries sustained in the accident.

15. In the premises, the Appellants prayed for orders that the appeal be allowed and that the trial court's judgment be reviewed and or set aside with costs to the Appellants.

Respondent's Submissions

16. On his part, the Respondent submitted supporting the finding by the trial court, both on the issue of liability and on quantum of general damages awarded by the court.

17. Regarding the trial court's finding on liability, the Respondent submitted that the evidence submitted at trial met the threshold required under section 107 of the *Evidence Act*. Further, it is the Respondent's position in this appeal that the 2nd Appellant who testified for the Appellants admitted at trial that the accident occurred and that the police blamed him for the accident.

18. The Respondent submitted that the fact that the Appellants did not tender any evidence at trial controverting the conclusion in police abstract, no liability can be attributed to the Respondent. That this conclusion is solidified by the 2nd Appellant's admission that he changed lanes when he saw a stalled truck, thereby knocking the Respondent. according to the Respondent, had the 2nd Appellant, had the 2nd Appellant not changed lanes abruptly, the accident would not have happened.

19. On quantum of damages awarded by the trial court, the Respondent submitted that the award of Kshs. 800,000/- for general damages was reasonable and commensurate with the injuries suffered by the Respondent and that it is also within range of awards in comparable injuries.

20. Citing the decision in Peter Namu Njeru v Philemone Mwagoti [2016] eKLR, the Respondent urged this court to maintain the amount awarded by the trial court since the Appellants have failed to demonstrate any reason justifying the setting aside of the same.

Analysis and determination

21. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that unlike the trial court, it did not have

the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial court .....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

23. I have carefully reviewed the Appellant's memorandum of appeal filed herein, the pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions. I note that the issues for determination in this appeal are two, that is, whether the trial court's findings on liability was supported by law and evidence, and whether the quantum of damages awarded by the trial court was fair and reasonable in the circumstances of the case.

24. I will first deal with the issue of liability and thereafter proceed on the issue of quantum of general damages.

Liability

25. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, the legal burden of proof is on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both the claimant and the Defendant. See Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal stated that: -

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

26. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in Khambi and Another vs. Mahithi and Another [1968] EA 70, where the court stated that: -

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous,

and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

27. Regarding the Appellants' submissions that the Respondent failed to prove his case at trial, I note that the in his plaint dated 28th June 2021, the Respondent pleaded at paragraph 5 thereof as follows; -

> " 5. On or about the 13th day of April, 2021 the Plaintiff was lawfully and carefully crossing along Forest road when motor vehicle registration No. KCS 039Q was so recklessly and carelessly driven that the same was allowed to knock down the Plaintiff occasioning him severe bodily injuries and has since suffered loss and damage."

28. From the proceedings, I note that the Respondent testified on 6th July 2023 as PW2 and adopted his Witness Statement of 28th June 2021 as his evidence in chief. In his witness statement, the Respondent stated as follows; -

> " I was lawfully and carefully crossing Forest road at a usual pedestrian crossing point after ascertaining that it was safe to do so with motorists having stopped to allow for the same when while I was about to finish crossing, motor vehicle registration No. KCS 039Q was so recklessly and carelessly driven that the driver.....knocking me down and as a result I sustained severe body injuries."

29. For the Appellants, I note that the 2nd Appellant testified on 3rd August 2023 and adopted his witness statement of 21st February 2022 as his evidence in chief. He testified that on the date of the accident, he was driving along Forest Road from Parklands area towards Waiyaki way. That he slowed down at the pedestrian crossing and that immediately he passed it, he accelerated at 60km/hr which according to him is within the allowed limit. It was further his evidence that as he was driving, he noticed that there was a breakdown in the middle of the road and that in order to avoid crashing on it, he swerved right and that is when he knocked down the plaintiff who was then standing on the right side of the road.

30. On cross examination, he admitted that he had seen the Respondent standing from a distance before the accident. He however denied that there was zebra crossing (pedestrian crossing point) at the scene of the accident.

31. I have carefully reviewed the evidence by both the Respondent and the 2nd Appellant and I find the Respondent's version of how the accident happened more credible than that of the 2nd Appellant. The 2nd Appellant in his evidence in chief admitted that there was a pedestrian crossing around where the accident happened. However, on cross examination, he denied the existence of any pedestrian crossing. But on re-examination, he stated that the pedestrian crossing was just three (3) meters from where the accident happened.

32. From the 2nd Appellant's evidence, it is evident that there was a pedestrian crossing within the radius of three meters from where the accident happened. With this in mind and taking into account the 2nd Appellant's evidence in chief that he knocked down the Respondent when he was driving at around 60km/hr, I cannot help but find the 2nd Appellant wholly liable for the accident.

33. Further, the 2nd Appellant's evidence that he knocked the Respondent when he swerved to the right side of the road to avoid hitting a breakdown which was right in front of him is another indicator which is likely to lead to the 2nd Appellant's culpability for the accident. Swerving without ensuring that it is safe to do so is in itself negligence, particularly taking into account his admission that he had seen the Respondent "standing from a distance before the accident."

34. In the circumstances, I hold as the trial court did, that the 2nd Appellant was solely to blame for the accident.

35. Liability is therefore assigned at 100% against the Appellants. The 1st Appellant being the registered owner of the subject motor vehicle is held vicariously liable for the 2nd Appellant's negligence.

Damages

36. On quantum, it was the Appellants' contention that the award of Kshs. 800,000/- issued by the trial court for general damages is high and excessive and that the same should be reduced to a figure of Kshs. 300,000/=.

37. The general rule is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court in assessing damages erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see Mbogo vs Shah (1968) EA 93 and Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727).

38. In the case of Catholic Diocese of Kisumu v Sophia Achieng Tele Civil Appeal No 284 of 2001 [2004] 2 KLR 55, the Court of Appeal set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms: -

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

39. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The general principle is that courts should endeavour to give reasonable compensation and to secure some uniformity in the general method of approach. The Court of Appeal observed in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR stated that it is reasonably expected that so far as possible, comparable injuries should be compensated by comparable awards. The court stated that –

> " 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."

40. From the record, I note that in his amended plaint dated 28th June 2021, the Respondent pleaded that as a result of the accident, he suffered the following injuries; Fracture of two ribs on the left chest wall, blunt head injury, bruise on both hands, recurrent headaches, recurrent chest pains, lacerated scars on the scalp, lacerated scars on the right forehead, lacerated scars on the left cheek and lacerated scars on the left eye.

41. The Respondent was examined by two doctors whose reports did not have any significant variation on the nature of the injuries. Dr Cyprianus Okoth Okere was the first to examine the Respondent.

According to his report dated 25th May 2021, Dr. Okere noted that the Respondent sustained the following injuries; -

i. Blunt Head Injury with lacerations on the scalp, right forehead, left check and left eye.

ii. Fracture of two ribs on the left chest wall 2-6

iii. Bruises on both forearms and hands

iv. Bruises on both Knees.

42. The second medical report by Dr. Wokabi dated 25th May 2022 also largely confirms the injuries as per the medical report by Dr. Okere.

43. The Appellants in proposing the sum of Kshs. 300,000/- as general damages relied on the case of West Keya Sugar Company Limited v David Luka Shirandula [2017] eKLR where a sum of Kshs. 180,000 was awarded in general damages for fractures of 2 ribs on the right side, blunt injury to the right thigh, blunt injury to the right ankle, bruises to both elbows and blunt Injury to the right knee.

44. The Appellants also cited the case of Bolpak Trading Co Ltd & another v Gilbert Onyango Odie [2022] eKLR where general damages of Kshs. 250,000/- was awarded in the year 2022 for right rib fracture, 8th right rib fracture, chest contusion, bruises on the face, blunt trauma to the lower back, right knee and left hand.

45. The Respondent on the other in urging the court to maintain the trial court's award of Kshs. 800,000/- on the other hand relied on the case of A.M suing through next friend M.A.M vs *Mohamud Kahiye 2014 civil case 209 of 2010* where an award of Kshs. 800,000/- was made for multiple fractured ribs on the left side, extensive friction burns on the chest, abdomen and both legs and intra-abdominal injuries with laceration of the liver.

46. I have carefully reviewed the authorities cited by the parties in support on the respective submissions on the issue of quantum and note that the injuries suffered in this case are closely similar to those suffered in the case of Bolpak Trading Co Ltd & another v Gilbert Onyango Odie [2022] eKLR cited by the Appellants.

47. I find that the Injuries in the case of A.M suing through next friend M.A.M vs *Mohamud Kahiye 2014 civil case 209 of 2010* cited by the Respondent were more severe in the sense that they included "intra-abdominal injuries with laceration of the liver."

48. However, noting that no two cases can be similar and that decided cases are merely meant to be a guide, I award a sum of Kshs. 450,000/- in this case as general damages for pain and suffering suffered by the Respondent as a result of the accident.

49. Accordingly, the award of Kshs. 800,000/- issued by the trial court as general damages for pain and suffering is hereby set aside and substituted with a sum of Kshs. 450,000/-.

50. The rest of the award by the trial court was not challenged in this appeal. I therefore leave them undisturbed.

51. The appeal having partially succeeded, I direct that each party is to bear their own costs.

52. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 31ST DAY OF OCTOBER 2024.

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

..... for the Appellants

..... for the Respondent