Otieno v Wanjawa (Civil Appeal E094 of 2024)
[2024] KEHC 13404 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13404 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E094 OF 2024

RE ABURILI, J

OCTOBER 31, 2024

BETWEEN

WILFRED OMONDI OTIENO ..... APPELLANT

AND

PETER OKUMU WANJAWA ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable J. Kimetto in the Principal Magistrate's Court in Maseno delivered on the 16th April 2024 in Maseno PMCC No. E074 of 2021)

JUDGMENT

Introduction

1. The appellant Wilfred Omondi Otieno was sued by the respondent Peter Okumu Wanjawa for general and special damages for injuries sustained on the 1.1.2021 in a road traffic accident. The respondent averred that on the material day, he was riding motor cycle registration no. KMCY 324Z along Nyangweso – Kodiga road when at Kanyabola area the appellant's motor vehicle registration number KCY 204L Toyota Isis station wagon was so carelessly and recklessly driven at high speed that it lost control, veered off its lane and rammed into the respondent's motor cycle.

2. In response the appellant filed statement of defence dated 28th May 2021denying all the respondent's allegations and put him to strict proof. The appellant pleaded contributory negligence on the part of the respondent that led to the accident.

3. The trial court in its judgment apportioned liability equally between the parties herein and further proceeded to award the respondent general damages of Kshs. 600,000 as well as special damages of Kshs. 12,150.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 16th May 2024 raising the following grounds of appeal:

    a. That the learned trial magistrate erred in law and in fact in arriving at a decision that is contrary to the law and facts/evidence before the court.

    b. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record thus reaching an erroneous finding on quantum awarded to the respondent.

    c. That the learned trial magistrate erred in law and fact by failing to consider and analyse the appellant's submissions and the judicial authorities tendered before court thereby arrived at wrong findings on the issues before the court.

    d. That the learned magistrate erred in fact and in law in ignoring the testimony of the appellant that the respondent was not qualified to control the said motorcycle, having no valid driving license and took absolutely no measures to avoid the accident thus contributing to the accident.

    e. That the learned trial magistrate erred in law and fact by making an award of general damages that was excessive in the circumstances and not in consonance with earlier precedence.

    f. That the learned trial magistrate erred in law and fact by failing to find that the respondent had failed to prove his case and thereby failing to dismiss the case for want of merit.

5. The parties agreed to canvass the appeal by way of written submissions but only the appellant filed his submissions.

The Appellant's Submissions

6. The appellant submitted that the Respondent's allegations and testimony as to the circumstances leading to the accident were far-fetched as he was an unskilled rider, operating a motor cycle that was not his and due to his inexperience took absolutely no measures to avoid the accident and further that the respondent had no capacity to carry passengers and in doing so put both his life and the passengers' lives at risk.

7. It was further submitted that the respondent failed to produce any substantive evidence and/or call any independent witness to corroborate his testimony and allegations of negligence on the part of the Appellant and further that the Police abstract produced by the Respondent did not show who was to blame for the accident but only indicated that the matter was pending under investigation.

8. The appellant submitted that based on the aforementioned it was clear that the Respondent failed to prove his case on a balance of probability and that it was thus an error on the part of the Trial Court in holding the Appellant 50% liable for the alleged accident without any proof at all and that the respondent ought to be held fully liable for the accident and this court proceed to set aside the judgment of the lower court to an award striking out the Plaintiff's suit.

9. On quantum, the appellant submitted that although the Respondent alleged during trial that he had not healed from the injuries he sustained and was still under medical attention, no evidence was given to support this assertion.

10. The appellant submitted that the award of Kshs. 612,150 as awarded by the trial court was quite excessive in the circumstances and that in awarding the said sum, the trial court failed to refer to any decided case law in which the Plaintiff therein suffered almost similar injuries.

11. The appellant thus submitted that noting the current authorities and awards on injuries similar to those the Respondent sustained, an award of Kshs. 300,000.00 was a reasonable compensation for the Respondent. Reliance was placed on the cases of:

    i. Naomi Momanyi v G4S Security Services Kenya Limited [2018] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. She was awarded Kshs. 200,000. The doctor during trial confirmed the injuries sustained by the Plaintiff and noted that at the time of examination, she had a scar on the right lateral hand which was swollen. He observed that her right leg was deformed and wasted. His conclusion was that the fracture had not healed well and would require internal fixation. He assessed permanent disability at 30%. The Appellate court substituted the trial court's award with Kshs. 300,000.

    ii. Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR. The Plaintiff was awarded by the trial court damages of Kshs. 300,000 having suffered the following injuries: head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. On appeal, the Appellate court upheld the trial court's award of Kshs. 300,000.

Analysis and Determination

12. This Being a first appeal the court relies on a number of principles as 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."

13. I have carefully considered the grounds of appeal, the evidence adduced before the trial magistrate as well as the appellant's written submissions. I have also read the Judgment of the trial court. I find that the issues for determination are:

    1. whether the trial court erred in law and fact in finding both parties to the accident equally liable for the occurrence of the accident; and

    2. whether the quantum of damages awarded to the respondent were inordinately high as to warrant interference by this court.

14. On liability, the trial court apportioned liability equally between the parties herein. In Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 Lord Reid reasoned that:

> "To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it....
>
> The question must be determined by applying common sense to the fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One

must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

15. He who alleges must prove. This is what the law under sections 107,109 and 112 of the *Evidence Act* provide as extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held 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 places 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."

16. The appellant submitted that the respondent failed to prove that the appellant was liable for causing the accident. The appellant who was the defendant in the trial court testified that he was going home from the market when he met an oncoming motorcycle that in addition to the rider had 3 passengers. He testified that the passengers on the motorcycle had no helmets and that they were about to hit him but that he avoided it but that they still knocked his car on the side. He testified that he took the respondent and his passengers to hospital after the accident. In cross-examination, the appellant testified that the respondent was speeding when the accident occurred. He further denied that the accident was a head-on collision but that his bumper hit the respondent's motorcycle.

17. Conversely, the respondent in advancing his case had testified that he was carefully riding his motorcycle when the appellant's station wagon that was being driven carelessly at a high speed veered of its lane into his and hit them. He admitted that he was carrying a pillion passenger and her son.

18. In cross-examination, the respondent testified that he saw the oncoming motor vehicle and that after it hit him, the appellant tried to speed off from the scene but was stopped by members of the public. It was his testimony that he had a helmet and reflector jacket but that the helmet got broken and was left at the scene of the accident. He further testified that he had a driving license but that it got lost during the accident.

19. In Treadsetter Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR Ibrahim J (as he then was) in allowing an appeal, quoted Charles Worth & Percy On Negligence, 9th Edition at P. 387 on the question of proof, and burden thereof where he stated:

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

20. Similarly, in Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J quoted Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where she stated that:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission

for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

21. However, In the case of Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another, Kisii HCC.A 29/2016 Majanja J (RIP) cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR citing with approval the decision in Baker v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

22. Justice Majanja stated that where the court is unable to determine who is to blame, it has to apportion liability equally as illustrated by the Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed that –

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

23. The learned Judge then held that –

> " I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party."

24. In the instant case, it is clear that an accident occurred on the 1.1.2021 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him on the side but further admits that he hit the respondent with his bumper while the respondent claimed that the appellant's driver veered off its lane and onto his side prior to colliding with him. Both parties claimed that the other was speeding. The respondent maintained that he had a helmet on, which broke following the accident and was carrying a female pillion passenger with her child while the appellant claims that the motorcyclist was carrying three people. Further, that his driving licence got lost at the scene of accident. It is not clear whether the rider was the third person. The rider also maintained that he had his reflector jacket on.

25. I reiterate that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong.

26. In this case, I find that the trial magistrate addressing her mind properly to the law and facts in determining the issue of liability would have found that both parties were liable for the accident. The circumstances of, and evidence presented in this case warranted a 50:50 contributory negligence between the appellant and the respondent. I find no reason to differ with her finding. She had the opportunity to hear and see witnesses as they testified and assessed that evidence first hand, unlike this court on appeal. I thus find that the trial magistrate did not err in finding both parties equally liable for causing the accident. Accordingly, I uphold the trial magistrate's finding on liability.

27. Turning to the issue of quantum, it is trite that the assessment of damages is a matter of discretion by the trial court and an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome.

28. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)"

29. Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal observed thus:

> " ...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."

30. With the foregoing principles in mind, I have examined the pleadings and evidence by the respondent as to the exact injuries sustained in the material accident as follows:

    a. Head injury with cut wounds

    b. Injury to the left eye area with cut wounds

    c. Injury to the mouth with broken teeth

    d. Injury to the neck

    e. Injury to the chest with bruises

    f. Injury to the back

    g. Injury to the right and left shoulders with bruises

    h. Injury to the right leg with fracture

    i. Injury to the left leg with cut wounds

    j. injury to the left big toe with cut wounds

31. The said injuries are contained in the P3 report form produced by the respondent and further evident in the treatment notes from Yala Sub-County Hospital, referral form from Inuka Hospital, X-ray request form from Siaya County Referral Hospital and X-Ray notes from Ritri Medical Imaging Clinic. In essence, the respondent sustained a fracture to the mid shaft tibia, 2 upper broken incisors and soft tissue injuries to the chest, neck, mouth, shoulders and the legs.

32. In Naomi Momanyi v G4S Security Services Kenya Limited [2018] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300, 000.00.

33. In Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR, the appellate court declined to disturb an award of Kshs. 500,000.00 for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

34. In Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR, the appellant sustained a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibiofibular and was awarded general damages of Kshs. 300,000 which was upheld by the appellate court.

35. From the review of the decisions on the comparable injuries, although no two injuries can be exactly the same, I find that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend demonstrated above is to award general damages in the range of Kshs 300, 000.00 to Kshs. 500, 000 for similar injuries. Taking into account inflation and time lapse since the earlier awards were made.

36. I am therefore not persuaded that I should interfere with the award of general damages made by the trial court. As a consequence of the above, the appeal herein against quantum of damages fails.

37. In the end, I find that this appeal lacks merit entirely. I dismiss it and uphold the trial magistrate's judgment both on liability and quantum.

38. As the respondent did not participate in the appeal, each party shall bear their own costs of the appeal.

39. This file is closed.

40. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE