Kamau v Mukhango (Civil Appeal 29 of 2021)
[2024] KEHC 13317 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13317 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 29 OF 2021

JN KAMAU, J

OCTOBER 30, 2024

BETWEEN

JAMES NJOROGE KAMAU ..... APPELLANT

AND

REGAN AMBWENJE MUKHANGO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. O. Ongeri (PM) delivered at Vihiga in Principal Magistrate's Court Case No 53 of 2018 on 28th July 2020)

JUDGMENT

Introduction

1. In his decision of 28th July 2020, the Learned Trial Magistrate, Hon S. O. Ongeri, Principal Magistrate, found the Appellant to have been fully liable for the injuries that the Respondent herein sustained. He entered Judgment in favour of the Respondent herein against the Appellant as follows:-

   General Damages Kshs 200,000/=

   Plus costs and interest

2. Being aggrieved by the said decision, on 29th July 2020, the Appellant filed undated Memorandum of Appeal. He relied on four (4) grounds of appeal.

3. His Written Submissions were dated 6th March 2024 and filed on 11th March 2024 while those of the Respondent were dated 3rd May 2024 and filed on 24th June 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Learned Trial Magistrate erred in finding the Appellant fully liable for the accident;

    b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

7. The court deemed it prudent to address the issue under the following distinct heads.

I. Liability

8. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with under this head as they were all related.

9. The Appellant pointed out that the Respondent stated that he was aboard Motor Vehicle Registration No KBN 942Q. He averred that the said subject Motor Vehicle was not his but belonged to one Ndungu Njega. He pointed out that the Trial Court made an award for an accident that occurred on 5th September 2020 involving Motor Vehicle Registration No KBA 942Q.

10. He contended that there were two (2) accidents which had occurred on the same road, Majengo-Luanda. One accident occurred at Bukuga at 2.00 pm and the other one at Ligali happened at 3.30 pm. He questioned the fact that the accident occurred at 3.30 pm which was the same time that the Respondent was assisted to Luanda Royal Healthcare Services by a good Samaritan and reported the same at Vihiga Police Station. He blamed the Trial Court for having conspired with the Respondent to defraud him.

11. On his part, the Respondent argued that as the Appellant did not call the driver of his Motor Vehicle to testify how the accident occurred, no material was placed before the Trial Court to assist it apportion liability between them. He submitted that the Appellant had not made out a case to enable the court disturb the Judgment of the Trial Court.

12. He further asserted that the reference to Motor Vehicle Registration Number KBN 942Q was a memory lapse as he had forgotten the actual registration number. He asserted that the pleadings were clear that the vehicle was Registration Number KBA 942Q. He added that the Appellant was given a chance to cross-examine him on the same and that he believed that the Appellant had known that was an error. He contended that the Appellant never submitted and/or rebutted that fact.

13. The Respondent testified that on 5th September 2017, he was in Motor Vehicle Registration No KBN 942Q when the same was driven fast, lost control and landed into a ditch on the right side of the road as a result of which he sustained injuries.

14. The Appellant denied the occurrence of the accident. He, however, admitted that he was the owner of the Motor Vehicle Registration No KBA 942Q, a fact that he reiterated in his Written Submissions. He did not submit on the issue of the Respondent having referred to Motor Vehicle Registration Number KBN 942Q and not Motor Vehicle Registration Number KBN 942Q.

15. The Police Abstract dated 26th September 2017 that was produced as an exhibit indicated that the accident involved Motor Vehicle Registration No KBA 942Q Nissan Matatu which belonged to the Appellant herein. In the premises, this court agreed with the Respondent that his reference of Motor Vehicle Registration Number KBN 942Q was only an apparent error that did not dislodge liability on the part of the Appellant.

16. Going further, in the case of Khambi and Another vs Mahithi & Another [1968] EA 70, it was held that an appellate court would not interfere with the apportionment of liability save where such apportionment was manifestly erroneous.

17. As the Respondent was a fare-paying passenger in the Appellant's Motor Vehicle, he was not in control of the said vehicle. He had no power to control the same so as to exercise caution to avoid the accident. Besides, the Appellant did not call any eye witness to tender evidence as to what may have happened and whether or not the Respondent was involved in the causation of the accident so as to enable the court determine the issue of contribution on liability on his part. Thus, the Trial Court could not have been faulted for having held the Appellant hundred (100%) per cent liable for the accident herein.

18. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and is hereby dismissed.

II. Quantum

19. The Appellant did not list any ground of appeal on the issue of quantum. However, he submitted on the same. The court therefore found it prudent to address itself to his submissions on quantum as he was a layperson and was representing himself in the proceedings herein.

20. He questioned why the doctor who prepared the medical report from Kisumu was not listed as a witness and why the same examination was not done by a doctor from Mbale Hospital where the same had been indicated in the OB at Vihiga Police Station.

21. He placed reliance on the case of Maxwell George Murungaro Mbugua vs A.G (citation not given) without highlighting the holding that he was relying upon.

22. On his part, the Respondent submitted that the amount of damages awarded by the Trial Court was reasonable and fair given the circumstances of the case although there was a possibility of it awarding higher damages. He averred that the Appellant had not made any ground for disturbing the Judgment. He contended that the Appeal lacked merit and urged the court to dismiss the same with costs.

23. Notably, in his Plaint dated and filed on 26th June 2018, the Respondent averred that he sustained loss of consciousness, deep cut wound on the head, blunt injuries to the neck, chest, back, waist and right hand, severe blunt injuries to the fingers of the right hand and injuries to the left eye. He produced P3 form and treatment notes as his evidence.

24. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko[2004] eKLR.

25. It must be understood that money can never really compensate a person who had sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.

26. However, this assessment was not without limits. A court had to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.

27. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high award would lead to higher insurance premiums which would in turn affect the members of public.

28. This court also had due regard to the case of Lim vs Camden HA [1980] AC 174 where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.

29. Similar injuries ought to attract comparable awards. However, in the quest for consistency, courts also had to recognise that no case was exactly the same as the other. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes. Each case therefore had to be decided according to its own peculiar circumstances but keeping in mind that any monies awarded had to be sustainable.

30. It was not mandatory that a trial court must analyse each and every case that had been submitted by a party. It would suffice if the trial court considered what was most comparable to the injuries a plaintiff had suffered with a view to coming up with an appropriate assessment of compensation.

31. An appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. It could only interfere where the award of general damages was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of Margaret T. Nyaga vs Victoria Wambua Kioko (Supra).

32. Remaining faithful to the doctrine of stare decisis and taking the inflationary trends into consideration, this court took the view that the award of Kshs 200,000/= for the soft tissue injuries that the Respondent herein sustained was fair in the circumstances of the case herein.

33. In arriving at the said conclusion, this court had due regard to the following cases:-

    1. Fred Barasa Matayo vs Channan Agricultural Contractors [2013] eKLR

       The appellate court reviewed an award of Kshs 250,000/= downwards to Kshs 150,000/= where the respondent therein had sustained moderate soft tissue injuries that were expected to heal in eight months' time.

    2. Dickson Ndungu vs Theresia Otieno & 4 Others [2014] eKLR

       The appellate court reviewed the award of Kshs 250,000/= general damages downwards to Kshs 127,500/= where the respondent had sustained soft tissue injuries.

    3. Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd [2015] eKLR

The appellate court reduced the award of Kshs 700,000/= general damages to Kshs 150,000/= where the respondent therein had sustained injuries to the left elbow, pubic region, lower back and right ankle.

Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated appeal that was lodged on 29th July 2020 was not merited and the same be and is hereby dismissed. As he was a layman, this court deviated from the general principal that costs follow the event and directs that each party will bear its own costs of the Appeal herein.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE