Njoroge & another v Nyambura (Civil Appeal E1398 of 2023) [2024] KEHC 14072 (KLR) (Civ) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1398 OF 2023

MA OTIENO, J

OCTOBER 29, 2024

BETWEEN

JOSEPH MWANGI NJOROGE .... 1ST APPELLANT

KENNETH MBURU KIHAATO .... 2ND APPELLANT

AND

JAMES MURIGI NYAMBURA .... RESPONDENT

(An appeal from the Judgement and Decree of Honourable Selina N. Muchungi (SRM), delivered on 17th November 2023 in the Milimani CMCC No. E308 OF 2022)

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 17th November 2023 in the Milimani CMCC No. E308 OF 2022 in which the Respondent sued the Appellants seeking compensation for the injuries suffered in a road traffic accident which occurred along Ngong Road on 6th January 2022 involving the Respondent's motor cycle registration No. KMCE 031Z and the 2nd Appellant's motor vehicle registration No. KAA 225B then being driven by the 1st Appellant.

2. In a plaint dated 10th April 2017, the Respondent (then a Plaintiff) pleaded that on the date of the accident, he was lawfully riding his motor cycle registration number KMCE 031Z along Ngong Road, Nairobi when the 1st Appellant negligently drove motor vehicle registration number KAA 225B, causing it to lose control and knock down the plaintiff's motorcycle, thereby causing the injuries.

3. On 17th November 2023, the trial court rendered its judgment in the dispute and apportioned liability between the Appellants and the Respondent in the ration 50:50. Subject to contribution, the court also awarded damages in favour of the Respondent as follows; -

a. General damages of Kshs. 1,600,000/-;

b. Special damages of Kshs. 105,000/-;

c. Cost of future medical expenses of Kshs. 400,000/-;

d. Loss of earning capacity – Kshs. 200,000/-

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

The Appeal & Cross-Appeal

5. Aggrieved by the decision of the trial court, the Appellants vide their memorandum appeal dated 14th December 2023 as amended on 21st February 2024 lodged an appeal to this court, raising four grounds of appeal that; -

i. The learned trial magistrate erred in law and in fact in awarding a sum of Kes.1,600,000/=for general damages which was excessive in view of the injuries sustained by the Respondent that it presented a miscarriage of justice.

ii. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.

iii. The learned trial magistrate erred in law and in fact in awarding general damages that was an entirely erroneous estimate based on wrong legal principle and misapprehension of the evidence.

iv. The learned trial magistrate erred in law and in fact in holding that the Appellant was 50% to blame for the accident.

6. On his part, the Respondent filed a cross appeal on the issue of liability vide his notice of Cross-Appeal dated 4th March 2024. The cross-appeal is on the ground that in apportioning liability in the ratio of 50:50, the trial court ignored the weight of evidence adduced at the hearing.

7. The appeal and cross appeal were canvassed by way of written submissions. The Appellant's submissions is dated 28th June 2024 whilst that of the Respondent is dated 25th July 2024.

Appellant's submissions

8. The Appellant submitted that the evidence submitted by the Respondent at trial concerning the circumstances under which the accident happened, contradicted his pleadings. According to the Appellants, while the Respondent pleaded at paragraph 4 of the plaint that accident was caused by the 1st Appellant who at the time was driving on the wrong side of the road, the evidence tendered at trial by and on behalf of the Respondent did not support that averment.

9. Citing the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR on the principle that parties are bound by their pleadings, the Appellant submitted that the trial court erred in not rejecting the Respondent's evidence which contradicted his pleadings.

10. It was further the Appellant's submissions that there was further contradiction in the Respondent's case in the sense that while the Respondent's evidence at trial was that Ngong road at meteorological department where the accident happened has one lane, the police officer who testified at the hearing confirmed the road is a dual carriage way on both sides heading into and out of Nairobi. That while

Respondent's witness indicated there is no barrier between the two lanes, the police officer confirmed there is a barrier between the two lanes.

11. The Appellant further submitted that the trial court erred in holding the Appellant 50% liable without stating how the 1st Appellant contributed to his portion of the blame. That taking into account the contradiction in the Respondent's pleadings and evidence, the Appellant asserted that the Respondent did not prove his case to the standard required by the law.

12. It was the Appellant's argument in his submissions in this appeal that the trial court having found it not convincing that the accident happened in the manner narrated by the Respondent, the proper conclusion and holding which the trial court ought to have reached was to find that the Respondent had failed to prove his case on a balance of probabilities and not to find the Appellant 50% liable in the manner that it did. The case of Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR was cited by the Appellant in support of this position.

13. On the quantum of general damages awarded by the trial court, the Appellant submitted that the same was high and excessive and that the same did not take into account the injuries suffered by the Respondent as a result of the accident.

14. The Appellant attacked the Respondent's choice not to rely on the medical report dated 29th March 2022 by Dr. G.K. Mwaura at the hearing. According to the Appellant, the decision by the Respondent to rely on the medical report dated 2nd September 2022 by Dr. N.H. Bhanji was meant to exaggerated the injuries suffered as a result of the accident. The Appellant asserted that the injuries as stated in Dr. N.H. Bhanji's medical report were exaggerated and were was not supported by the initial treatment notes.

15. The Appellant submitted that in awarding damages, the trial court ought to have been guided by the medical report of Dr. Wambugu dated 31st October 2022, being the last in time and which showed that the Respondent had made adequate recovery.

16. It was therefore the Appellant's submissions that taking into account the injuries as pleaded in the plaint and the medical report of Dr. Wambugu dated 31st October 2022, the amount of Kshs. 1,600,000/- awarded by the trial court was erroneously high estimate particularly taking into account recent court decisions on similar injuries.

17. Citing he cases of Harrison Maina Kimani v Francis Karanu Macharia [2022] eKLR and that of *Mwangi alias Luke Wambugu Mwangi v Irungu (Civil Appeal 72 of 2018*) [2022] KEHC 14346 (KLR) (26 October 2022) (Judgment), it was the Appellant's position that the award of Kshs. 1,600,000 given by the trial court was inordinately high and disproportionate to the injuries suffered in the circumstances to occasion a miscarriage of justice.

18. The Appellant therefore submitted that an award of Kes. 700,000/= would have been adequate recompensation for the injuries sustained by the Respondent as a result of the accident.

19. In the premises, the Appellant prayed for orders that the appeal be allowed and that the judgment be reviewed and or set aside with costs to the Appellant.

Respondent's Submissions

20. The Respondent in his submission supported the quantum of general damages awarded by the trial court. The Respondent's position in this appeal is that the trial court, in awarding the damages merely exercised its discretion as per law permitted.

21. Citing among others the decision in the case of *Peter Mburu Echaria v Priscilla Njeri Echaria (Civil Application No. 204 of 1998*), the Respondent asserted that the exercise of discretion by a court can only be interfered with where it is demonstrated that in exercising that discretion, the trial court took into account irrelevant matters; that the court did not take into account a relevant factor; that the court misapprehended the law applicable in the situation or that the decision is plainly wrong.

22. The Respondent further submitted that in the instant appeal, the Appellants have failed to demonstrate that the trial court's exercise of discretion suffered any of the above factors.

23. On liability, the Respondent submitted in cross-appeal that the trial court in apportioning liability in the ratio of 50/50 between the Appellants and the Respondent went against the weight of evidence before her.

24. According to the Respondent, the trial court failed to appreciate that unlike the 1st Appellant's testimony which was uncorroborated, the Respondent's testimony on the circumstances under which the accident occurred was corroborated by the testimony of PW4, Nancy Nyawira. This according to the Respondent, resulted into the trial court's erroneous apportionment of liability between the parties.

25. The Respondent therefore prayed that the appeal on the issue of quantum be dismissed and the cross-appeal on the issue liability be allowed with costs to the Respondent.

Analysis and determination

26. 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..."

27. 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..."

28. I have carefully reviewed the Appellant's memorandum of appeal filed herein, pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions. I note that while both parties are disputing the trial court's finding on liability, the Appellant, also has an issue with the quantum of general damages awarded by the trial court.

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

Liability

30. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof 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 parties. 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."

31. 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."

32. Regarding the Appellant's submissions that the evidence submitted by the Respondent at trial concerning the circumstances under which the accident happened contradicted his pleadings, I note that in his amended plaint dated 15th September 2022, the Respondent pleaded at paragraph 4 thereof as follows; -

> " On the 6th January 2022 along Ngong road, the Plaintiff was lawfully riding motor cycle registration number KMCE 031Z when the first defendant with the authority and in the course of his employment to the second defendant, so negligently drove managed and/or controlled motor vehicle registration number KAA 225B that he caused and/or permitted it to lose control and knocked motor cycle registration number KMCE 031Z when he was driving on the wrong side of the road…"

33. Further, I note that the Respondent testified in court on 7th June 2023 and adopted in evidence, his undated witness statement filed in court on 5th July 2022. In the witness statement, the Respondent describing the circumstances under which the accident happened. He told court that on the material day, he was lawfully riding motor cycle registration number KMCE 031Z along Ngong Road when the 1st Respondent, being the driver of the 2nd Respondent so negligently drove or managed motor vehicle registration number KAA 225B, causing it to knock down the Appellants motor cycle. That at the time of the accident, the 1st Respondent was driving the said motor vehicle on the wrong side of the road.

34. The Respondent who testified at trial as PW2 also told court that the accident happened at Meteorological Area, along Nong Road and that at the time, he was riding the motor cycle from town (Nairobi) heading to Ngong while the 1st Defendant was driving the subject motor vehicle from the

opposite direction towards town. That the vehicle suddenly turned left and hit his motorcycle, thereby causing the accident.

35. The Respondent's witness (PW4), Bancy Wawira who was at the time of the accident a pillion passenger in the Respondent's motor cycle registration number KMCE 031Z also testified on behalf of the Respondent and told court that they were at the time heading towards Ngong from and that the Appellants' motor vehicle was on their right-side heading towards town veered into their lane, hit the Respondent's motor cycle, thereby throwing to their left side.

36. For the Appellants, I note that their testimony on circumstances under which the accident happened was quite different from that stated by the Respondent. According to the 1st Appellant who testified at trial as DW2, both the Respondent's motor cycle and his vehicle were heading the same direction, that is, from town (Nairobi) towards Ngong. That while opposite the Meteorological Department which was along the road to his left, he indicated to enter the department which was to his left. That before he turned, he checked the side morrows which revealed that the road was clear. That as he was turning, he had a bang on the rear of the vehicle and later realized that it was the Respondent's motor cycle that had hit his vehicle from the rear.

37. From the above it is evident that the 1st Appellant blamed the Respondent for the occurrence of the accident and the Respondent also on his part blamed the Appellant. The evidence by police officer, No. 1138 PC Victor Ogolla of Karen Police Station who testified both as PW3 and DW1 did not help matters either, perhaps because he was not at the scene of the accident and his testimony was based on the version that was reported at the police station by the 1st Appellant.

38. The fact that the accident occurred on 6th January 2022 involving the motor vehicle in question which was then being driven by the 1st Appellant and a result of which the Respondent was injured is not disputed. The issue before me is simply to determine who is to blame for the accident.

39. It is trite law that where liability is not clear, courts have held that both parties are to bear liability equally. This is the guidance given by the Court of Appeal in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR, where the court stated 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. In the case of Barclay – Steward Limited & Another v Waiyaki [1982-88] 1 KAR 1118, this Court said: -
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> > "The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."

40. The Court went on to state: -

> " The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

41. Just like in the Hussein Omar Farah case (supra), there are two conflicting versions as to how the accident in question occurred. Each party insists that the other is to blame. None was however able to establish the fault of the other. Accordingly, the proper direction is for this court to hold, as the trial court did, that liability is to be equally shared between the parties.

42. In the circumstances, both the Appellants' appeal and the Respondent's Cross-Appeal on the issue of liability fails and is hereby dismissed.

Damages

43. On quantum, it is the Appellant's contention that the award of Kshs. 1,600,000/- awarded by the trial court for general damages is excessive and that the same should be reduced to a figure of Kshs. 700,000/=.

44. 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).

45. 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."

46. 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."

47. From the record, I note that in his amended plaint dated 18th October 2022, the Respondent pleaded that as a result of the accident, he suffered the following injuries; -

    i. Head injury (cerebral concussion)

    ii. Fracture of the shaft of the right femur (thigh bone)

    iii. Loss of four teeth (2 upper incisors on the right and two lower incisors on the right)

48. The Respondent was examined by three doctors whose reports did not have any significant variation on the nature of the injuries. Dr Mwaura was the first to examine the Respondent. According to his report dated 29th March 2022, he noted that the Respondent sustained injuries which were substantially similar to those pleaded by the Respondent in his amended plaint. The second to examine the Respondent was Dr. Bhanji who in his report dated 2nd September 2022 also enumerated injuries consistent with those pleaded by the Respondent as well the findings by Dr. Mwaura. The last to examine the Respondent was Dr. Wambugu who in his report of 31st October 2022 also confirmed that the Respondent suffered a fracture of the right femur, loss of upper and lower incisors, facial bruises and concussion.

49. From the above, I note that the medical reports by the three doctors were largely consistent on the mature of the injuries that were suffered by the Respondent as a result of the accident. The allegation by the Appellants that Dr. Bhanji's medical report exaggerated the nature of the injuries suffered by Respondent not to be correct.

50. I have 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 Harrison Maina Kimani v Francis Karanu Macharia [2022] eKLR where the trial court awarded a sum of Kshs. 700,000/- for a fractured right femur, blunt injuries to the right wrist joint, lacerated wounds on the upper lip, broken two upper incisor teeth and loose lower incisor teeth.

51. However, noting that in this case four incisor teeth were lost as opposed to two in in the Harrison Maina Kimani case (supra), and factoring in the time difference, I will award a sum Kshs. 1,000,000/- for general damages.

52. I find that the level in permanent disability of 25% assessed by the case of Silverio Mbiti Njiru & 2 others v Elizabeth Syombua Munyoki [2018] eKLR which was cited by the Respondent at trial and which apparently guided the trial court's decision is higher than the level of between 4% - 10% assessed in the instant case. Consequently, the trial court's award of Kshs. 1,600,000/- is hereby set aside and in its place, as sum of Kshs. 1,000,000/- awarded as general damages.

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

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

55. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 29TH DAY OF OCTOBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

Kariuki.......... for the Appellants

N/A ...... for the Respondent