Onyango v Nanak Trucking Company Limited & another (Civil Appeal E1097 of 2023) [2024] KEHC 15209 (KLR) (Civ) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1097 OF 2023

RC RUTTO, J

NOVEMBER 29, 2024

BETWEEN

PATRICK OWINO ONYANGO ..... APPELLANT

AND

NANAK TRUCKING COMPANY LIMITED ..... 1ST RESPONDENT

STEPHEN MACHARIA ..... 2ND RESPONDENT

(Being an appeal from the judgment delivered by Hon. G.N Sitati (PM) on 4th October 2023 in Milimani Commercial Court No. E1612 of 2022)

JUDGMENT

1. This appeal challenges both liability and quantum. The Appellant sued for general and special damages resulting from an accident that occurred on 28th February 2020 along North Airport Road. As per the Plaint, the 1st Respondent was sued in his capacity as the registered owner and/or insurer of motor vehicle registration number KCB 185C while the 2nd Respondent was sued in his capacity as the authorized driver.

2. The Appellant's case was that the 2nd Respondent negligently and carelessly drove the 1st Respondent's motor vehicle causing it to veer off the road and knocked the Appellant as a result of which he sustained severe bodily injuries for which he suffered loss and damages.

3. The Respondents, in their defence, denied occurrence of the accident and on a without prejudice basis averred that the accident was as a result of negligence on the part of the Appellant. The matter proceeded for hearing where upon the respective parties adduced their evidence and submissions.

4. Upon hearing parties, the trial court found both parties equally liable for the said accident and entered Judgment in the following terms: -

    i. Liability 50:50

    ii. General damages for pain and suffering Kshs. 400, 000/=

    iii. Special damages Kshs 3, 550/=

    iv. Less 50 % Kshs 201, 775/=

    Total Kshs 201, 775/=

    Plus, costs and interest

5. Aggrieved by the Judgment the Appellants filed this appeal citing the following grounds. That:

    a. The learned magistrate erred in law and in fact by arriving at a finding on liability and quantum apparently erroneous.

    b. The Learned trial Magistrate erred in law and in fact by awarding general damages so low as to be erroneous.

    c. The Leaned Trial Magistrate erred in law and in fact by finding that liability attaches at 50:50 as between the Plaintiff and the Defendant.

    d. The Learned Magistrate erred in law and in fact by not fully considering and/or appreciating all the facts before him.

    e. In all circumstances of the case, the finding of the Learned magistrate in liability and quantum was characterized with misapplication of the law and wrong exercise of discretion.

6. The Appeal was canvassed by way of written submissions as follows;

Appellant's submissions

7. The Appellant identified two issues for determination: (1) whether the learned trial magistrate applied the correct principles of law and available facts in apportioning liability at 50:50, and (2) whether the learned trial magistrate applied the correct principles of law and available facts in determining the award on quantum.

8. The Appellant submitted that the key issue for determination is the circumstances surrounding the accident and a determination of who is at fault. The Appellant argued that he provided unchallenged testimony about the accident. That his testimony was not rebutted since the Respondents did not present an eyewitness to contradict his account. He relies on the case of Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR on the consequence of failing to call evidence and urges this court to assign 100% liability to the Respondents.

9. The appellant contended that he provided sufficient evidence of the injuries he sustained through treatment notes. It was submitted that an award of Kshs 1,200,000 would have be just compensation for his pain and suffering. He cited the following authorities Leonard Kinuthia v William Sirma Kiboros & Another [2000] eKLR, Juhudi Kilimo Company Limited & Another v Chege [2022] KELC 3112 (KLR), and Easy Coach Limited v Emilu Nyangasi (2017) Civil Appeal No. 20 of 2015, to support his claim and substantiate the reasonableness of this amount.

10. The appellant requested that the court allow the appeal as prayed, by revisiting both the liability apportionment and the quantum awarded in light of the arguments and evidence presented.

Respondents' submissions

11. The Respondents while relying on the case of Selle & another vs Associated Motor Boat Co Ltd & Others (1968) EA 123 urged the court to re-evaluate and reconsider the evidence tendered. It was their submission that the Appellant failed to prove his case to the requisite standard, despite the lack of rebuttal evidence from the Respondents.

12. The Respondent emphasized that the burden of proof still lay on the Appellant to proof its case as per the requirements of Section 107 of the *Evidence Act*. To support this argument, reference was made to the cases of Midans Services Limited & Another v Ronald Kapule [2022] eKLR and Charterhouse Bank Limited (under statutory management) v Frank N. Kamau [2016] eKLR among others.

13. They further submitted that there can be no negligence with causation. They noted that the police officer who testified stated that no party was officially blamed for the accident and that the investigation remained incomplete due to lack of particulars. According to the Respondents, this testimony did not assist the Appellant proof its case that the 2nd respondent was to blame for the occurrence of the accident. They urged the court to be guided by the case of Susan Kanini Mwangangi & Another v Patrick Mbithi Kilonzi (2019)eKLR that held that the Appellant had a duty of proving the facts constituting negligence on the part of the Respondent even if the respondent chose to remain silent.

14. On the issue of quantum, the Respondents cited the case of David Mangi Macharia v Anestar Secondary School [2020] eKLR to submit that comparable awards should be awarded for similar injuries. They argued that the injuries sustained by the Appellant, as per Dr. Okere's medical report dated 8th June 2020, included a fracture of the left calcaneus and a degloving injury on the left leg. They noted that the Appellant had fully recovered from these injuries and was no longer seeking medical treatment, as confirmed in his testimony. Based on this prognosis and recovery, the Respondent submitted that an award of Kshs 200,000 would be reasonable compensation.

15. The Respondents relied on the cases of Gearld Muhuthia Mwangi v John Mburugu & Another [2022] eKLR, Robert Kithinji Kithaka v AG [2018] Eklr, Jubilee Hauliers Limjted & nother v Mary Waithera Wanja [2019] eKLR and Hashim Mohamed Said & Another v Lawrence Kibor Tuwei [2018] eKLR.

16. They urged the court to uphold the findings of the trial court and dismiss the Appeal with costs.

Analysis and Determination

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

18. After careful analysis of the record of appeal and the submissions, the following issues arise for determination:

    a. Whether the court erred in awarding liability at 50:50.

    b. Whether the award of damages was excessively low in the circumstances.

Whether the court erred in awarding liability at 50:50.

19. The dispute herein is who is to blame for the accident. The scope and extent of the fundamental legal principles on this subject are settled. In the cases of Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR the Courts on this issue held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

20. Examining the evidence presented before the trial magistrate, the Appellant (PW1) testified to the circumstances surrounding the accident and invited PW2 the investigating officer to support his claim. The Respondents did not adduce any evidence, they closed their case without calling any witnesses.

21. After analyzing the evidence of the parties, the honourable magistrate found that both parties were to blame for the accident.

22. Having gone through the record, it is undisputed that on 28th February 2020, an accident involving the parties herein occurred. What is in issue is who was to blame for the accident. From the evidence on record, the Appellant position is that he was walking off the road along North Airport Road when the 1st respondent's motor vehicle was so recklessly and carelessly driven that the driver (2nd Respondent) who was over speeding, lost control and the vehicle veered off the road and knocked him. On cross-examination the Appellant stated that the accident occurred at night, and that he lost consciousness and could not tell whether he, himself, was to blame for the accident. The Appellant's witness PW2, the investigating officer, confirmed the occurrence of the accident and stated that due to lack of evidence and lack of an eye witness on how the accident occurred, she did not blame any party for the accident. She refrained from attributing blame to either party, as each side blamed the other for the accident. It was her evidence that the investigation remains incomplete and the exact details and conclusions of fault remains unresolved.

23. Having reviewed the evidence, this court notes that the Appellant evidence is not corroborated and conclusive in itself. While the Appellant PW1 blamed the Respondents for being negligent and causing the accident, his witness, PW2, testified that she could not blame any party due to lack of evidence and an eye witness as to how the accident occurred. Further, PW2 stated that the victim blamed the driver and the driver blamed the victim as such the file was still pending under investigations. Notably, during cross-examination, the Appellant stated that he could not tell whether he himself he was to blame for the accident. In essence, he did not outrightly absolve himself as having been the cause of the accident or having contributed to its occurrence.

24. Thus the evidence adduced by the Appellant and his witness does not point on who was to blame for the accident. The evidence of PW1 was not corroborated by PW2. While PW1 entirely blames the Respondents for the accident, PW2 who was the investigating officer could not establish how the accident occurred and never blamed any party since each party was attributing the blame to each other.

25. Consequently, I draw reference from the Court of Appeal decision in the case of Stephen Obure Onkanga v Njuca Consolidated Limited (2013) eKLR where the Court of Appeal when faced with a similar situation held that;

> " Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the Appellant or the Respondent, both should be held equally to blame."

26. Given this lack of decisive evidence and in the absence of any other evidence, the court is compelled to assess the accident's circumstances based on the available particulars. In the circumstances therefore, I do find that the apportionment of liability equally between the parties reflects a balanced approach in the circumstances. I therefore do agree with the trial court's application of logic in reaching this decision.

27. To this end, I am satisfied that the learned trial magistrate correctly apportioned liability between the parties in the manner he did, and I see no need to interfere with the finding on liability.

Whether the award of damages was excessively low in the circumstance.

28. On general damages, the Appellant proposed the sum of Kshs 1, 200,000/= and cited, among other cases, Leonard Kinuthia v William Sirma Kiboros & Another [2000] eKLR, where the appellant sustained a fracture of the right ankle and comminuted fracture of the lateral malleolus and soft injuries. An award of Kshs 700,000 was given in that case. However, just like the trial court noted, this award was awarded because of the aspect of the victim being permanently incapacitated. The Respondents argued that since the injuries are not disputed, the award should be maintained as it is commensurate with the injuries sustained.

29. In his judgment, the learned trial magistrate awarded the Respondent a sum of Kshs 400,000/=, less 50% contribution, amounting to Kshs 200, 000/=.

30. Upon re-examining the authorities, I note that the cases cited by the Appellant are over five years old with an exception of one cited by the Respondent, that is, Gerald Muhuthia Mwangi versus John Mburugu & Another [2022] eKLR in which case the injuries sustained by the victim in that case are different from the Appellant herein. I also observe that the learned trial magistrate did not cite any guiding authorities in arriving at his award.

31. Upon my study of the record, I observed that the injuries pleaded and supported by the medical evidence on record are as follows:

    a. Fracture of the left calcaneous bone

    b. Degloving injury on the left lower leg

32. In seeking comparable awards, I considered the case of Bhatyani Randeep & another v Johnstone Kianga Paul [2021] eKLR, where the injuries sustained were fractured left calcaneus and pains/soft tissue injuries. The court reduced the award from Kshs 400, 000/= to Kshs 250,000/=.

33. I have also considered the case of JTK (Suing at the Father of WR - Minor) v Bonaya Godana & another [2021] eKLR where the injuries sustained were comminuted fracture of the base of the right first metatarsal and a chip fracture fragment of the anterior portion of the right calcaneal bone. The court awarded the Appellant Kshs 480,000/= as general damages.

34. In view of the foregoing, I am satisfied that the award made by the learned trial magistrate was reasonable. It was within the range of comparable amounts awarded for similar injuries and, importantly, took into account relevant factors such as the gravity of the injuries, the time taken to heal, and inflation trends. I therefore uphold the trial magistrate's award and see no need to interfere with it.

35. Since the award of special damages has not been contested, I will not address it.

36. From the forgoing therefore I find no merit in the Appeal and I thus proceed to dismiss the same with costs to the Respondents.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2024

For Appellant:

For Respondent:

Court Assistant: