Joseph v Makakula (Civil Appeal E582 of 2022)
[2024] KEHC 16018 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E582 OF 2022

REA OUGO, J

NOVEMBER 28, 2024

BETWEEN

ROTICH KIPKEMOI JOSEPH ..... APPELLANT

AND

MARK MAKAKULA ..... RESPONDENT

(Appeal from the judgment of Hon. A.N. Makau (PM) delivered on 30{{^th}} June 2022 at the Chief Magistrate's Court at Milimani CMCC NO E7698 OF 2020)

JUDGMENT

1. This appeal originates from the magistrate's court in which the respondent was the plaintiff and sued the appellant for general damages, special damages, costs, and interest of the suit.

2. According to his pleadings, on 10th June 2020 he was lawfully travelling as a pillion passenger on motorcycle registration number KMEB 667B along Mombasa Road when motor vehicle registration number KBU 842 which was being driven recklessly knocked down the respondent occasioning him severe injuries. He claimed to have sustained a bone crack on the left tibia, bruises on the left knee blunt injury , blunt injury to the left hip, recurrent pains on the left tibia, bruised scar on the left knee, left tibia is tender on palpitation, with a permanent incapacity is 5%.

3. The appellant denied causing the accident as a result of negligence on its part. In the alternative without prejudice, he averred that if an accident occurred then the same was solely caused or substantially contributed to by the negligence on the part of the rider of the motorcycle.

4. The trial court in her judgment found that the respondent proved his case on a balance of probabilities. The court awarded the respondent, general damages of Kshs. 500,000/-, Kshs 3,550/- special damages, costs, and interest to the respondent.

5. The appellant dissatisfied with the finding of the subordinate court has filed this instant appeal challenging the judgment on the following grounds:

    1. The learned trial magistrate erred in law and in fact in failing to appreciate that the burden of proof rests on the plaintiff and never shifts to the defendant.

    2. The learned trial magistrate erred in law and in fact in failing to appreciate the circumstances and the contradictions in the plaintiff's case thereby coming to a wrong conclusion on the issue of liability.

    3. The learned trial magistrate erred in law and in fact in failing to take into account the fact that the evidence adduced by the plaintiff contradicted his pleadings.

    4. The findings of the learned trial magistrate goes against the weight and the totality of the evidence adduced by the plaintiff thereby coming to wrong finding on both law and fact.

    5. The learned trial magistrate erred in law and in fact in awarding an inordinately high figure for general damages for pain, suffering and loss of amenities.

    6. The learned trial magistrate erred in law and in fact in failing to appreciate that the injuries suffered by the plaintiff were not so serious to warrant the sum awarded. The learned trial magistrate thus failed to take into account the relevant factors pertinent to award of damages generally.

Analysis And Determination

6. This being the first appeal, the Court must reconsider and re-evaluate the evidence and draw its conclusion. However, the Court must make due allowance for the fact that it has neither seen nor heard the witnesses. (See Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123).

7. Edwin Ayaya No 93593 (Pw1) stationed at the industrial area police station produced the police abstract as Pexh1 and told the court that the appellant was to be blamed for the accident. On cross-examination, he testified that he was not at the accident scene.

8. Mark Makakula (Pw2) adopted his witness statement. According to his witness statement, he was lawfully riding a motorcycle along a driveway in a carpark at the Airtel compound when the appellant recklessly drove out of the said park without due regard and attention and knocked the respondent. He blamed the owner of the motor vehicle who hit him at a parking while refusing to give him way. On cross-examination, he testified that he was inside Amutei's parking lot and was the rider of the motorcycle. He clarified that he was not a passenger.

9. The appellant did not call any witnesses but produced a medical report.

10. The appellant now submits that the first 4 grounds in their appeal are against the trial court's finding on liability. The appellant submits that the respondent did not prove its case on a balance of probabilities. He merely alleged that the vehicle hit him without testifying as to how the accident occurred. They also faulted the respondent for having pleadings and evidence that were at variance. The appellant submitted that parties are bound by their own pleadings (see Independent Electoral & Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014]). It was submitted, the trial magistrate failed to address the variance in the pleadings and testimony of the respondent raised by the appellant in cross-examination. In the alternative, it was submitted that the court should find the appellant 50% liable.

11. The respondent in their submissions argue that there was evidence that the accident occurred and the respondent sustained injuries. The appellant failed to call any witnesses to challenge the respondent's testimony. It was further submitted that the appellant has sought to delve into the typographical errors of the respondent's pleadings. He contends that the magistrate made no error in apportioning liability at 100%.

12. I have considered the rival submissions and the evidence on record. It is not in dispute that the plaint described the respondent as a pillion passenger. However, the respondent in his testimony gave clear evidence that he was the rider of the motorcycle and not the pillion passenger. This position was captured in the police abstract which described the respondent as the rider.

13. It is my view that whether the respondent was the rider or merely a passenger does not alter the accounts of how the accident occurred or the fact that the respondent sustained injuries. The respondent argued that the mistake in the plaint was a typographical error occasioned by his advocate. Consequently, I am hesitant to penalize the respondent for his advocate's mistake. Moreover, I find that no prejudice was caused to the appellant. The court in Gachege *v Njuguna (Civil Appeal 170 of 2021*) [2023] KEHC 18890 (KLR) (16 June 2023) (Judgment) when faced with a similar issue had this to say:

> " 22...While in the Plaint and his Witness Statement, the Respondent pleaded and/or stated that he was a pillion passenger, at the hearing, he testified that he was in fact the rider and it is him who had passengers on board...
>
> 23. In the circumstances, one may be quick to conclude that since it is trite law that a party is bound by his Pleadings, the Respondent's case should have failed on that ground alone. However, in this case, I would not hasten to make such a declaration. This is because it is apparent that at the hearing all parties proceeded on the basis that the Respondent was the rider, not pillion passenger. The cross-examination was also along the same lines. I also note that the Appellant never even raised this issue before the trial Court, not even in the final Submissions. Further, whether or not the Respondent was the rider or a mere passenger does not in any way change the versions given on how the accident occurred. The Police Abstract produced in evidence also confirms that indeed that the Respondent is the person who was injured as a result of the accident. I also take judicial notice of the fact that Pleadings are ordinarily drawn by Advocates. The client, who is a layman, may not even understand or comprehend what drafting of Pleadings entails. I would therefore be reluctant to penalize or punish the Respondent for the mistakes of his Advocate. More important however, is the fact that I have not come across any prejudice that was visited upon the Appellant as a direct result of the erroneous pleading of the Respondent as being a pillion passenger instated of being referred to as the rider."

14. In this case, Pw1 testified that at the parking lot of Airtel on Mombasa Road, the appellant recklessly drove out of the said park without due regard and attention and knocked the respondent. The respondent also produced a police abstract marked as Pexh1 which showed that the investigations concluded that the appellant was to blame. The appellant did not call any witness and the evidence of the respondent remained uncontroverted. Therefore, I find that the respondent proved his case on a balance of probabilities and that the apportionment of liability by the trial magistrate was proper.

15. On quantum, the appellant in his submissions has challenged the injuries sustained by the respondent. He argues that the respondent only sustained soft tissue injuries as per the report of Dr Maina Ruga. The report by Dr Okere did not have any basis for claiming that the respondent sustained a fracture. The respondent in his testimony did not also particularize the injuries sustained.

16. On the other hand, the respondent argued that the award of the trial magistrate was reasonable and appropriate taking into account the injuries sustained.

17. In this case, the discharge summary from Athiriver Shalom Community Hospital shows that the appellant was diagnosed with soft tissue injury. He was admitted on 10/6/2020 and discharged on 13/6/2020. The report indicates that several X-rays were conducted: pelvic X-ray, knee X-ray and chest X-ray. While the respondent was at the hospital, he was managed heavily by painkillers being: intramuscular diclofenac, diclomol S.R, dinac gel and tramadol hydrochloride. The P3 form filed on 15/6/2020 noted that the pop was applied to the respondent however, this was never indicated on the discharge summary merely termed the injuries as soft tissue injuries. The medical report by Dr Cyprianus Okoth Okere also indicated that the respondent sustained a fracture yet the same was not indicated in the discharge summary.

18. The report by Dr. Maina Ruga on the other hand noted that the respondent did not have any x-ray films at the time of the examination. Dr Maina Ruga considered the discharge summary and P3 form and was of the view that the respondent sustained a blunt injury to the knee and there was no permanent incapacity arising from the injuries. The report of Dr Maina Ruga is consistent with the discharge summary and did not disclose the presence of a fracture. Therefore, having considered both the medical report, the P3 form and the discharge summary, I find that the respondent only sustained soft tissue injuries. Should the court therefore interfere with the award of damages? The Court of Appeal in Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)) KLR 30 stated that:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

19. In this case, it has been established that the respondent did not suffer any fracture. It therefore follows that the award of damages by the trial magistrate was thus excessive. In Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs, and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000 on general damages and substituted it with an award of Kshs 140,000. In Nanyuki Express Cabs Savings and Credit Cooperative Society v Ikungu (Civil Appeal 67 of 2020) [2023] KEHC 23652 (KLR) (17 October 2023) (Judgment) the plaintiff therein sustained the following injuries: lacerations and muscle contusion on the left forearm and dorsum of the hand; deep laceration on the right anteromedial aspect of the shin; small multiple lacerations on the scalp and was awarded Kshs 150,000/- This court having considered comparable awards for similar injuries, I find that the trial court's award of Kshs 500,000/- was excessive. I therefore set aside the lower court judgment on general damages and substitute it with judgment for the respondent for the sum of Kshs.150,000/-. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Ochieng - For the Appellant

Respondent - Absent

Wilkister -C/A