Wanjiku v Ondieki (Civil Appeal E653 of 2022)
[2024] KEHC 16234 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E653 OF 2022

REA OUGO, J

NOVEMBER 28, 2024

BETWEEN

GRACE MUTHONI WANJIKU ..... APPELLANT

AND

HESBON ONDIEKI ..... RESPONDENT

(Being an appeal from the judgment delivered on 20th July 2022 by Hon. H.M Nyaberi (CM) in Milimani Commercial Civil Suit No 110 of 2020)

JUDGMENT

1. The suit filed by the respondent at the subordinate court sought orders of general damages, special damages, costs and interest of the suit. The main contention raised in the plaint was that the respondent who was a pedestrian sustained bodily injuries following an accident that occurred on 25th September 2019 along North Airport Road. He blamed the appellant for being negligent and knocking him down with her motor vehicle KBG 118R while he was on the pavement.

2. The appellant filed her statement of defence denying the particulars of negligence attributed to her driver. In the alternative, she averred that if any accident occurred, then the same was solely caused by the whole or contributory negligence of the respondent. She accused the respondent of crossing the road recklessly and claimed that the respondent was the author of his misfortunes.

3. The trial magistrate entered liability in favour of the respondent in the ratio of 85:15 arguing that the appellant had a higher duty of care to other road users as a vehicle is a lethal machine and a proper lookout in such places was highly expected. She awarded damages as follows:

   General Damages Kshs 800,000/-

   Less 15% liability Kshs 120,000/-

Kshs 680,000/-

Special damages Kshs 189,066/-

Total Kshs 869,066/-

4. The appellant dissatisfied with the finding of the court lodged his appeal on the following grounds:

    1. That the learned Honourable Magistrate erred in law and fact in apportioning the liability ratio of 85:15 in favour of the respondent against the appellant completely disregarding the circumstances under which the accident occurred especially the fact that the plaintiff was clearly to blame for causing the accident after attempting to cross a busy road instead of using a designated footbridge for the pedestrians.

    2. That the Learned Honourable Magistrate erred in law and fact in apportioning 85% blame on the appellant's driver when the circumstances of the accident showed that the respondent was the sole author of his misfortune.

    3. That the Learned Honourable Magistrate erred in law and fact in awarding the plaintiff Kshs 800,000/- in respect of general damages for pain and suffering which was inordinately high considering the current awards for similar injuries.

    4. That the learned Honourable Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on liability and cited in the written submissions presented and filed on behalf of the appellant.

    5. That the Learned Honourable Magistrate erred in law and fact in awarding the respondent special damages amounting to Kshs 185,516 without strict proof by production of receipt as required by the law.

5. The appeal was canvassed through written submissions and parties filed their rival submissions.

Analysis And Determination

6. This being the first appeal, the Court must reconsider and reevaluate 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. The first issue raised in the appeal is on liability. The only witnesses to the accident were the respondent who testified as Pw1 and the driver of the appellant's motor vehicle Alphonce Mutuku Ndaka (Dw1).

8. Pw1 testified that he was standing on the pavement, waiting to cross the road to board a vehicle to town, when the appellant's vehicle knocked him. He lost consciousness and woke up at Kenya National Hospital.

9. Dw1, on the other hand, testified that he was driving at 50 Kph. As he approached Kobil Footbridge, the respondent suddenly started crossing the road, as he was about 5 meters away. Dw1 hooted, flashed the headlights, and swerved to the left to avoid hitting Pw1. However, the right side of the side mirror hit him.

10. The appellant argues that it was not contested that there was a footbridge, the respondent was the one with greater care to use the footbridge. Human traffic was not expected on the road due to the footbridge. There was no justification for why the respondent attempted to cross the road other than at

the designated footbridge. The appellant cited the case of Julius Omolo Ochanda & another v Samson Nyaga Kinyua [2010] eKLR where the court held:

> " 31. Further, it is not disputed that the accident occurred just next to a flyover bridge. It would have been prudent for the respondent to use the flyover bridge to cross the road. Therefore, the respondent was negligent in crossing the road at a point where it was not safe for him to do so. I find that the respondent failed to ensure his safety while attempting to cross the road by failing to use the flyover bridge.
>
> 32. On the other hand, the evidence before the trial magistrate was not sufficient to establish any of the particulars of negligence which were alleged by the respondent against the 1st appellant. It is true that the 1st appellant had a lethal machine (vehicle), under his control and that the appellant's vehicle was involved in a collision with the respondent. However, given the circumstances of the accident, in particular the fact that the respondent suddenly ran across the road, onto the path of the appellant's vehicle which was travelling on the main highway, it is difficult to lay any blame on the 1st appellant. As was held by the Court of Appeal in Civil Appeal No.254 of 1996, Patrick Mutie Kamau & another vs Judy Wambui Ndurumo (supra), a pedestrian owes a duty to other highway users to move with due care and follow the provisions of the highway code. Clearly, the accident was caused by the respondent running suddenly across the road without due regard to his own safety and that of others."

11. They also submitted that the police abstract did not blame the appellant's driver and that investigations into the accident were incomplete.

12. The respondent submitted that the presence of the footbridge did not absolve the appellant of the fact that he should have exercised a high level of care when using the highway to avoid any mishap involving human traffic and vehicles. He pointed out that Dw1 gave contradictory testimony. He argued that it should be taken into account that some areas are well known for their human traffic despite the presence of a footbridge nearby.

13. I have considered the evidence at the trial court and the rival submissions on liability. The Pw1 testified that the accident occurred on the pavement on the other hand, it was Dw1's testimony that the accident occurred on the road. In Anne Wambui Nderitu v Joseph Kiprono Ropkoi & another [2004] eKLR, the Court held as follows:

> " As a general proposition 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. That is captured in sections 109 and 112 of the Act."

14. In this case, the appellant did not provide any other evidence to support his case as the police abstract was to the effect that the matter was pending under investigations. However, this does not absolve the appellant of any liability. In Muriuki v Ngugi [2024] KEHC 10839 (KLR) the court held that:

> " In the Court's view, the existence of a footbridge would not give a licence to a driver to put his foot flat on to the pedal so to speak. The driver could not throw caution to the wind.

A driver must at all times be alert and give allowances for the unexpected, and out of the ordinary actions of other road users."

15. Therefore, in the circumstances, I apportion liability in the ratio of 50:50.

16. The only issue that remains is the quantum. The appellant has argued that the award of general and special damages was excessive.

17. The appellant argues that the trial court based its assessment of general damages on the finding that the respondent was unable to perform heavy duty with permanent incapacity estimated at 30%. However, the report by Dr P.M. Wambugu established that permanent disability was at 2%. They faulted the magistrate for failing to weigh the respondent's medical evidence vis-à-vis the appellant's medical evidence. The appellant submits that an award of Kshs 300,000/- is sufficient and cited the cases of Philip Musyoka Mutua v Leonard Kyalo Mutisya [2018] eKLR, Samuel Ndirangu Nganga v Lucy Wambui Wachira [2013] eKLR and Patrisia Adhiambo Omolo v Emily Madala [2020] eKLR.

18. The respondent supported the trial magistrate's award of general damages.

19. The injuries sustained by the respondent are not contested. It is not in dispute that the respondent sustained the following injuries: bilateral fractures of the radius, a deep cut on the left upper lip and a blunt chest injury.

20. The medical report by Dr Cyprinus Okoth Okere revealed that on examination, there were surgical scars on both forearms distally anteriorly. The implants were in situ. The flexion of the wrist joint was tender and limited. He assessed the degree of permanent incapacity to be 30%. Dr P.M. Wambugu in his report concluded that there was a residual stiffness in the right wrist joint which was mild. He assessed the degree of permanent disability at 2%.

21. In this case, two conflicting medical reports were tendered as evidence. The parties did not call the two doctors to give evidence on why they arrived at the two varied opinions regarding the degree of permanent disability. The court in Shadrack Mathias & another v Agnes Muluki Wambua [2021] eKLR observed that:

> "20. This Court has had occasion to deprecate that mode of conducting legal proceedings. Parties, when they intend to have documents admitted without calling the makers ought to ensure that there is no inconsistency in the documentation since where a consistency arises it can only be resolved by calling the makers who would ordinarily be subjected to cross-examination in order to confirm their veracity. That would be case where two inconsistent medical reports were by consent produced by the parties. To my mind once parties agree on liability they ought to endeavour to harmonise the various medical or expert reports on record and agree at a common ground regarding the basis upon which assessment of damages is to be undertaken. If they are unable to do so, the makers of those reports ought to be called where the reports are conflicting for cross-examination. It is however unfair to the court to just throw all manner of reports ate the court and expect the court to decide which ones to rely on and which ones to discard..."

22. The court in China Road and Bridge Corporation(Kenya) v Job Mburu Ndungu [2021] KEHC 8928 (KLR) when faced with a similar matter held as follows:

> " 45. The two medical reports disagreed on the assessment of permanent incapacity. Whereas the respondent's doctor who had seen the respondent six months after the accident and put permanent incapacity at 50%, the appellant's doctor saw the respondent seven months later and put permanent incapacity at 15%. It would have been important for the trial court to state whether to accept the assessment of 50% by the respondent's doctor, or 15% by the appellant's doctor. In my view, to reconcile this discrepancy it is appropriate to take the average of the two assessments which would put disability at 32.5%."

23. Therefore, considering the degree of inconsistency in the two medical reports and the holding of the court in China Road and Bridge Corporation (Kenya) v Job Mburu Ndungu [supra] I find that the degree of permanent disability based on the average of the two assessments would be 16%.

24. 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."

25. In Ndungu & another v Munene (Civil Appeal 31 of 2020) [2022] KEHC 3023 (KLR) (21 April 2022) (Judgment) the respondent therein sustained the following injuries: cut wound and abrasion on the right forehead and bruises on the upper and lower lips, blunt injury to the right cheek with a broken right incisor tooth and extracted right 3rd molar tooth, fracture of distal end of the left radius bone, blunt injury on the pelvis, blunt injury to the chest, bruises on the left leg. The medical report noted that there was an apparent deformity on the left wrist with protruding distal radius bone. The respondent therein also suffered a weakened grip of the left hand. The court awarded Kshs 700,000/- as general damages.

26. The respondent herein suffered severe injuries compared to those sustained by the respondent in Ndungu & another v Munene case (supra). The respondent sustained bilateral fractures of the radius and permanent disability was assessed at 16%. Therefore, the award of Kshs 800,000/- is reasonable.

27. On special damages, it is trite law that they must be pleaded and strictly proved. Pw1 testified that the insurance paid Kshs 195,000/- while the printed bill was Kshs 380,516/-, therefore he paid the balance of Kshs 195,000/-. However, the respondent did not provide a receipt to prove payment of the balance, what was adduced as evidence was a printed interim bill. The only receipt availed by the respondent was for the payment of the sum of Kshs 35,516/-. Therefore, special damages proved were payment of hospital bill amounting to Kshs 35,516, medical report Kshs 3,000/- and search certificate totaling Kshs 39,066/-.

28. Consequently, I find that the appeal is partly successful and the award is therefore made up as follows:

    Liability apportioned at 50:50

    General Damages Kshs 800,000/-

Less 50% liabilit Kshs 400,000 /-

Kshs 400,000/-

Special damage Kshs 39,066/-

Total Kshs 439,066/-

29. The appellant shall have 2/3 costs of the appeal.

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

R.E. OUGO

JUDGE

In the presence of

Miss Sigei -For the Appellan

Miss Odonde -For the Responden

Wilkister - C/A