Kamau v Kariuki (Civil Appeal E608 of 2023)
[2024] KEHC 15214 (KLR) (Civ) (22 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E608 OF 2023

JM OMIDO, J

NOVEMBER 22, 2024

BETWEEN

WENDY NJERI KAMAU ..... APPELLANT

AND

BIDAN KAMENJU KARIUKI ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. S.A. Opande, Principal Magistrate delivered on 9th June, 2023 in Nairobi Milimani CMCC No. E7571 of 2020)

JUDGMENT

1. The Appellant herein seeks to upset the judgment and decree rendered on 9th June, 2023 in Nairobi Milimani CMCC No. E7571 of 2020. The grounds raised in the Memorandum of Appeal dated 7th July, 2023 are as follows:

    1. That the learned Magistrate erred in law and fact in failing to consider and find that the Appellant had shown a prima facie case with a high probability of success.

    2. That the learned Magistrate erred in law and fact in failing to consider and find that the Appellant was not blamed for causing the accident by apportioning 100% liability against the Appellant.

    3. That the learned Magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before the court to determine who was to blame for the accident between the Appellant and the Respondent.

    4. That the learned Magistrate erred in law and fact in failing to consider and find that the contents of a police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident occurred.

5. That the learned Magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.

6. That the learned Magistrate erred in law and fact in failing to consider and find that the police officer was neither present at the scene of the accident nor was he the investigating officer which goes against the evidentiary rules of direct evidence thereby rendering his testimony as hearsay.

7. That the learned Magistrate erred in law and fact in failing to consider and find that the Respondent's evidence was not direct evidence as he had no recollection of how the accident occurred.

8. That the learned Magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for the accident, both parties should be equally liable.

9. That the learned Magistrate erred in law and fact in failing to consider and find that there can be no liability without fault.

10. That the learned Magistrate erred in law and fact in failing to consider and find that the Respondent allegedly sustained a fracture of the right and left femur and blunt abrasions of the abdomen with the degree of permanent incapacitation assessed at 18%.

11. That the learned Magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that not two cases are exactly alike.

12. That the learned Magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to mulct the tortfeasor for the injury he had caused.

2. Although the above are listed as twelve distinct grounds, the same in precis, in my view, constitute just three grounds which have been couched in an expounded manner to include what ought to be stated in the submissions in support thereof. The three grounds I discern have been disclosed are that:

   a. That the learned trial Magistrate erred in law and in fact in reaching the finding that the Appellant was wholly to blame for the accident.

   b. That the learned Magistrate erred in law and in fact in reaching the finding that the Respondent sustained serious injuries that included fractures of the right and left femurs.

   c. That the learned trial Magistrate erred in law and in fact in making an award in general damages that was inordinately high and/or excessive.

3. The Appellant proposes that the appeal be allowed and the judgement of the lower court be set aside and that costs of the appeal be borne by the Respondent. No relief is sought as a substitute to the judgement of the lower court.

4. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.

5. This court is therefore empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing

and hearing the witnesses first hand. This duty was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 in which Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
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> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. Going to the trial court's record, the Respondent (the Plaintiff in the lower court), presented the suit, a tortious liability claim, vide an amended plaint dated 8th June, 2021, seeking the following reliefs against the Appellant (the Defendant in the lower court), following a road traffic accident that is said to have occurred on 16th November, 2019 involving the Respondent who was pushing a handcart alongside Forest Road and motor vehicle registration number KCU 006E, which as per the plaint was at the time being driven by the Appellant:

   a. General damages for pain, suffering and loss of amenities of life.

   b. Special damages Ksh.214,670/-.

   c. Costs and interest.

7. The Appellant resisted the Respondent's claim by filing a statement of defence dated 23rd August, 2021, denying wholly the Respondent's claim and sought that the suit be dismissed with costs.

8. The Respondent testified before the trial court as PW1 and adopted the contents of his witness statement dated 6th November, 2020 as his evidence in chief. He stated that the Appellant drove his vehicle negligently and hit him from the rear as a result of which the Respondent sustained serious bodily injuries, suffered damage and expended Ksh.209,120/- as treatment expenses, which he undertook to pay. He blamed the Appellant for the accident and relied on the particulars of negligence listed in the plaint as being attributable to the Appellant.

9. The Respondent produced the following documents in support of his case:P3 form.Motor vehicle copy of records.Invoice/receipt for Ksh.550/- for the copy of records.Discharge summary from Kenyatta National Hospital.Final invoice from Kenyatta National Hospital.Individual Credit Undertaking from Kenyatta National Hospital.Receipt from Kenyatta National Hospital.Letter dated 30th October, 2020.

10. Upon being cross examined by the Appellant's counsel, the Respondent told the trial court that he sued the Appellant because her name was given to him at the police station where the accident was reported as being the driver of the vehicle at the time of the accident. He stated that he lost consciousness after the accident occurred.

11. The Respondent called Police Constable Jessy Mwololo as his witness (PW2). The witness produced the police abstract that was issued following the occurrence of the accident.

12. On being cross examined, PW2 told the court that he was neither involved in the conduct of investigations on the accident, nor did he know whether the same were conducted.

13. The Respondent called Dr. Washington Wokabi (PW3) who told the court that he examined the Respondent on 29th April, 2020 and prepared a medical report. The doctor produced the medical report and the receipt for Ksh.3,000/- for the report as exhibits.

14. As per the report, the Respondent sustained the following injuries:Fracture of right femur.Fracture of left femur.Blunt and abrasions on the abdomen.

15. At the time of examination, the Respondent's legs were both weak, rendering him unable to stand or walk for long hours and was unable to work gainfully. The witness projected that at optimum rehabilitation, permanent disability upon the Respondent would settle at 18%.

16. The Appellant did not call any witness and parties filed their respective submissions.

17. In his judgement delivered on 17th May, 2023, the learned trial Magistrate listed two issues for determination:

    a. Whether the Defendants are (sic) liable as alleged by the Plaintiff.

    b. Whether the Plaintiff is entitled to the remedies sought.

18. With regard to the first issue for determination, in finding the Appellant 100% liable for the accident, the learned trial Magistrate rendered himself as follows:

> " Since the Defendant elected not to call any witness at the hearing of this suit, the Default caused the Plaintiff's evidence on record to proceed unchallenged, and the Defendant's pleadings to be rendered mere statements. This is the law.
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> The Defendant submits that, since the police abstract indicates that the matter is still pending under investigation, the Defendant cannot be blamed for having caused the alleged accident, given that the matter is still pending under investigation and the contents therein are a reflection of the OB. In my view, this is an erroneous position upon which the Defendant has perched her defence, when the Plaintiff's testimony with respect of how the accident occurred, places the blame at the driver of motor vehicle registration number KCU 006E, and which testimony was not controverted as required by law.
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> I have taken note that, in these matters i.e. running down, the courts are usually the determinants with respect to liability, and they place liability based on the evidence produced in court. In the present case, it is the uncontroverted testimony of the Plaintiff that an accident occurred. It is also the uncontroverted evidence of the Plaintiff, who the accident involved. Lastly, it is the uncontroverted testimony of PW1, who is to blame for the accident. In my view, this settles aspect of liability on a balance of probability.
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> The Defendant had the opportunity to call the driver of motor vehicle KCU 006E, to state the Defendant's view of how the accident (occurred?) but such a chance was never taken up. This is further proof that the Defendant had no real defence in law, on the aspect of liability, since if she had, nothing would have been easier (sic). In the end, the court returns the Defendant is wholly liable for the accident which occurred."

19. In the resulting determination, the trial court entered judgement for the Respondent against the Appellant as follows:

    a. The Defendants (sic) are hereby held 100% liable for the accident.

    b. The Plaintiff is awarded Ksh.1,000,000/- as general damages.

c. The Plaintiff is awarded Ksh.214,670/- as special damages.

d. Net award Ksh.1,214,670/-.

e. Interest on (d) and (e) at court rates from the date of judgement.

20. I have considered the memorandum and record of appeal, the submissions by the parties and the record of the lower court. The following issues present themselves for this court's determination:

i. Whether the trial court reached a proper finding that the Appellant was wholly to blame for the accident.

ii. Whether the trial court reached the proper finding that Respondent sustained serious injuries that included fractures of the right and left femurs.

iii. Whether the awards made by the trial court in general and special damages were inordinately high and/or excessive.

21. With regard to the first issue, it is instructive from the record of the lower court and as I have above stated that the Respondent testified and blamed the Appellant for the accident. He told the court that he was pushing his handcart along Forest Road when the Respondent's vehicle hit him from the rear as a result of which he sustained injuries. The Respondent attributed the particulars of negligence that he set out in the plaint to the Appellant.

22. As correctly observed by the trial court, the only evidence available on how the accident occurred is that of the Respondent. The same was not materially challenged on cross examination and I would therefore agree with the learned trial Magistrate that the evidence of the Respondent remained uncontroverted as no witness was called by the Appellant. It is to be remembered that in civil cases, the standard of proof is that of a balance of probabilities.

23. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J (as he then was) in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept,

> where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

25. Following the jurisprudence presented by the above authorities, I hold that as the Respondent presented his case and stated that the accident in question occurred and that the same was wholly caused by the negligence of the Appellant, and as the Appellant did not provide any evidence to challenge the position as set out by the Respondent before the trial court, the Respondent therefore proved on a balance of probabilities that the accident indeed occurred and that the Appellant was wholly to blame for the same.

26. Be that as it may, the observation and/or holding by the learned Magistrate, that where a Defendant elects not to call any witness at the hearing of a suit the evidence of the Plaintiff is rendered as automatically unchallenged and the Defendant's pleadings are rendered to be mere statements, was plainly in error. I say so because even in a case where a Defendant does not call witnesses, a Plaintiff is still required to discharge his burden of proving his case on a balance of probabilities. Where a Plaintiff does not discharge the burden, the court will still dismiss the case notwithstanding the fact that the Defendant did not call any witnesses.

27. As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya.

28. The evidential burden is placed upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is well espoused in Section 109 and 112 of the *Evidence Act*. (See also Evans Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR.

29. But as we have seen above, the foregoing notwithstanding, the learned trial Magistrate, albeit on the basis of different reasons, reached the correct finding on liability – that the Appellant was 100% to blame for the accident.

30. With respect to the second issue, which is whether the trial court reached the proper finding that Respondent sustained serious injuries that included fractures of the right and left femurs, the Respondent produced treatment documents to prove the injuries. He also called Dr. Wokabi who testified and told the court that the Respondent indeed sustained the injuries. The evidence of the Respondent and the doctor was not challenged. The trial court therefore reached the correct findings on the nature of injuries that the Respondent sustained.

31. With regard to the third issue which concerns quantum, the issue for this court to determine is whether the amount assessed and awarded as compensation to the Respondent was inordinately high or excessive.

32. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of Price & another v Hidler [1996] KLR 95 as follows:

> " The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

33. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.
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> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
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> > "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

34. There is also the authority of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

35. In the present appeal, the Appellant merely stated that the award under the head of general damages that was made in favour of the Respondent was inordinately high and/or excessive. The Appellant did not proffer and/or demonstrate to this court the ground that the exercise of the discretion by the trial court was clearly wrong or that the learned trial Magistrate misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion.

36. As is clear from the judgement of the trial court, the learned Magistrate relied on previous judicial pronouncements of superior courts where assessment on comparable injuries was made and further considered the circumstances of the case as presented in evidence that there would ultimately result permanent disability at 18%.

37. The courts in the cases of Peter Karoka aka Ngige v Mbaluka Malonza aka Eric & others [2018] eKLR and Edward Kamau & another v Hannah Mukuhi [2018] eKLR that were relied upon by the Respondent made awards of Ksh.800,000/- in respect of fractures involving one femur bone. Considering that the injuries that the Respondent sustained involved fractures of both the right and left femur bones, I cannot fault the trial court for awarding Ksh.1,000,000/- on the basis of the guidance by the two authorities. In my view, the discretion of the trial court was judiciously exercised.

There is therefore no basis upon which I can interfere with the discretion of the trial court on the award made in general damages.

38. In respect to special damages, the rule applicable is that the same must be specifically pleaded and strictly proved (see Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR). The Respondent pleaded the following items under the head of special damages:Copy of records Ksh.550/-Medical costs debt Ksh.209,120/-Medical costs paid Ksh.2,000/-Medical report Ksh.3,000/-Total Ksh.214,670/-

39. The Respondent produced an invoice for the medical costs but did not prove that he expended the Ksh.209,120/- and the item is not payable. All the other items were proved by production of receipts. The total amount payable under the head of special damages is therefore Ksh.5,550/-. In respect of special damages thus, the appeal has merit.

40. Being of the foregoing findings, I will allow the appeal only to the extent that I set aside the award in special damages of Ksh.214,670/- and substitute the same with an award of Ksh.5,550/-.

41. As the appeal is partly successful, each party shall bear their own costs.

42. Orders accordingly.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 22ND DAY OF NOVEMBER, 2024.

JOE M. OMIDO

JUDGE

For the Appellant: Ms. Mudeizi.

For the Respondent: Mr. Kaburu.

Court Assistant: Ms. Njoroge.