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Otieno v Otieno (Civil Appeal E124 of 2024)
[2024] KEHC 16565 (KLR) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16565 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E124 OF 2024

RE ABURILI, J

DECEMBER 31, 2024

BETWEEN

WILFRED OMONDI OTIENO .... APPELLANT

AND

ROSE ADHIAMBO OTIENO .... RESPONDENT

(An appeal arising out of the Judgement & Decree of the Honourable J. Kimetto in the Principal Magistrate's Court at Maseno delivered on the 21st May 2024in Maseno PMCC No. E076 of 2021)

JUDGMENT

Introduction

1. This appeal arises from a claim filed by the respondent herein vide a plaint dated 16th April 2021and determined in the trial court wherein the respondent sought general and special damages against the appellant herein for injuries sustained in a road traffic accident that occurred on the 1st January 2021.
2. In her said plaint, the respondent averred that she was a pillion passenger aboard motor cycle registration number KMCY 324Z that was hit by motor vehicle registration number KCY 204L Toyota Isis station wagon owned by the appellant that was driven carelessly and recklessly causing it to veer off its lane and onto the motor cycle's lane.
3. The appellant denied all the respondent's claim vide his statement of defence dated 28th May 2021 and attributed negligence on the part of both the respondent and the rider of motor cycle registration KMCY 324Z. As against the respondent, it was averred that he boarded a motor cycle being ridden by an unqualified rider and that she failed to wear protective gear and took no measures in avoiding the accident.

4. Following the hearing, the trial magistrate rendered her judgement on the 21st May 2024 in which she found the appellant 100% against the appellant and on quantum, she awarded the respondent general damages of Kshs. 500,000 as well as the proven special damages of Kshs. 4,380 and plus costs of the suit.

5. Aggrieved by the trial judgement and decree, the appellant filed this appeal dated 18th June 2024 in which he raised the following grounds of appeal:

    1. That the learned trial magistrate erred in law and in fact in arriving at a decision that is contrary to the law and facts/evidence before the court.

    2. That the learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record thus reaching an erroneous finding on quantum and liability awarded to the respondent.

    3. That the learned trial magistrate erred in law and fact by failing to consider and analyze the appellant's submissions and the judicial authorities tendered before court thereby arrived at wrong findings on the issues before the court.

    4. That the learned magistrate erred in fact and in law in ignoring the testimony of the appellant that the respondent boarded a motor cycle being controlled by an unqualified rider, wore no protective gear and took absolutely no measures to avoid the accident thus contributing to the accident.

    5. That the learned trial magistrate erred in law and facts by making an award of general damages that was excessive in the circumstances and not in consonance with earlier precedence.

    6. That the learned trial magistrate erred in law and facts by failing to find that the respondent had failed to prove her case and thereby failing to dismiss the case for want of merit.

6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. On behalf of the appellant, it was submitted that the Respondent failed to adduce any substantive evidence and/or call any independent witness to corroborate her testimony and allegations of negligence on his part. It was further submitted that the inadequacy in the Respondent's evidence as to how the accident occurred and/or causation thereof is a clear indication that the Respondent failed to prove her case on a balance of probability further that the Police abstract produced by the Respondent did not show who was to blame for the accident but only indicated that the matter was pending under investigation.

8. The appellant submitted that the trial court erred in making its determination that the Appellant was wholly to be blamed for the accident despite the fact that the Respondent was aware that the rider was not qualified to operate the motor cycle but chose to board the same. The appellant relied on the cases of Daniel Mbeche Sero v Husseina Enterprise & Another (2020) eKLR and that of Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR where it was stated inter alia that the burden of proof was at all times upon the Appellant to prove their case is not in doubt

9. On the quantum of damages awarded by the trial court, the appellant submitted that the award of Kshs. 500,000 was quite excessive in the circumstances. The appellant referred this court to the case of Mbaka Nguru & Anor. Vs James George Rakwar [1998] eKLR where the court held inter alia that damages must be within limits set out by decided cases and also within limits that the Kenyan economy

can afford, as large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.

10. The appellant's counsel submitted that despite the Plaintiff listing 'injury to the elbow and right fracture' to be among the injuries that she sustained, no x-ray reports were filed to prove the same and thus the damages awarded were too high for soft tissue injuries. It was submitted that an award of Kshs. 150,000 was a reasonable compensation for the Respondent.

11. The appellant's counsel further relied on the case of Climax Coaches Limited v Kavaya (Civil Appeal E129 of 2023) [2024] KEHC 6182 (KLR) (30 May 2024) (Judgment) where the Respondent suffered the following injuries: Head injury, injuries to the chest with fracture right clavicle, injuries to the abdomen, injury to the right shoulder with dislocation, injury to the wrist joint, injuries to the right/left legs with bruises and the Appellate court upon finding that the alleged fracture had not been proven by way of any documentation filed in court, substituted the trial court's award of Kshs. 500,000 with Kshs. 150,000.

12. Further reliance was placed on the case of Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR where the trial court awarded the Plaintiff damages in the sum of of Kshs. 300,000 having suffered the following injuries: head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb which award was upheld on appeal.

13. The appellant thus submitted that the Respondent's injuries were soft tissue injuries and thus the court ought to disturb the award of Kshs. 500,000 and substitute it with an award of Kshs. 150,000.

The Respondent's Submissions

14. On liability, the respondent submitted that the appellant failed to demonstrate that the trial court erred in apportioning liability as it was the appellant who failed to stop after the accident. The respondent further submitted that there was nothing to warrant this court's interference with the determination on liability as was held in the cases of Mkube v Nyamuro [[1983] KLR, Peres Wambui Kinuthia & Another v S.S. Mehta & Sons Limited [2015] eKLR and Kenya Bus Services Ltd v Humphrey where the Court of Appeal cited the case of Kansa v Solanki [1969] EA 318.

15. On the issue of quantum, the respondent urged the court not to interfere with the trial court's award as the same was not excessive.

Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach 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 demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

17. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

18. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, the issues determination are:

    a. Whether or not the determination on liability was fair and reasonable in the circumstances of this case.

    b. Whether or not the award of quantum was excessive in the circumstances of this case so as to warrant interference by this court.

19. This court has therefore dealt with the issues under the separate heads shown herein below.

20. On liability, in Khambi and Another v Mahithi and Another [1968] EA 70, it was held 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."

21. That was the position in Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

22. For the appellant to succeed on contributory negligence, he ought to prove the following factors as was provided for in the persuasive decision in Alfred Chivatsi Chai & Another vs Mercy Zawadi Nyambu [2019] eKLR:

    a. . The probability that the harm would not have occurred if that other person took care to mitigate the loss and damage.

    b. The likelihood of the harm as a result of breach of the duty of care by the tortfeasor.

    c. The nature of the social activity or legal duty, is risk creating activity in which the person owed the duty of care was engaged in. [emphasis added]

23. In determining contributory negligence, Lord Denning in Jones vs Livox Quarries Limited 1952 2 QB 608 where he stated that:

> " A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself and, in his reckonings, he must take into account the possibility of other being careless."

24. Further, in the case of Benner vs Chemical Construction Ltd [1971] 3 ALL ER 822 the Court of Appeal said in a judgment by David C.J that–

> “ In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence.”

25. It is trite law that he who alleges must proof. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein she was allegedly injured.

26. The respondent testified as PW1. She adopted her witness statement dated 16/4/2021 as her evidence in chief in which she reiterated her narration of the accident as stated in the plaint. She further produced her filed documents as exhibits 1 – 11.

27. In cross-examination, the respondent testified that she was aboard a motor cycle with her child, that the appellant’s motor vehicle hit them coming from the opposite direction and that it subsequently sped off. She testified that the rider slowed down and even stopped to avoid being hit but the said vehicle still hit them. The respondent admitted that she was not given a helmet to wear though she was aware that she ought to wear the same.

28. On his part, the appellant testified that he was driving but met an oncoming motorcycle that had 3 passengers together with the rider and that they had no helmets on. The appellant reiterated that he tried to avoid the accident but the motor cycle rider still went to their side and they knocked each other. He testified that after the accident, he stopped a motor vehicle and organized for the respondent to be taken to the hospital. He testified that the following day, he took the occupants of the motor cycle to Siaya District Hospital for a CT scan, bought him crutches and used to send him money.

29. In cross-examination, the appellant confirmed that he had not produced anything to show that he paid for the treatment and that neither had he provided any receipt to prove damages of his motor vehicle. The appellant further admitted that he had not called the alleged witness who he claimed was with him when the accident occurred.

30. I have considered the varying testimonies by both parties. In my opinion, the respondent was very firm in her testimony and even on cross-examination. Juxtaposed against this testimony was that by the appellant which despite the many allegations, all fell through on cross-examination. The appellant could not substantiate any claim which he had made in his testimony. In essence his averments were not supported by his testimony.

31. Regarding liability, it is not disputed in this appeal or before the lower court that the Respondent was a pillion passenger on the accident motor cycle. The rider of the motor cycle was not a party to the suit as he had not been served with the Third-Party Notice. The issues before court were therefore for determination as between the parties therein only as was held in the case of James Gikonyo Mwangi v DM (Minor Suing through his mother and next friend, IMO) [2016] eKLR. The appellant thus sought to lay claim of negligence on the motor cycle rider and he had the opportunity, before the trial court, to enjoin the alleged rider in line with the provisions of Order 1 Rule 15 of the Civil Procedure Rules but failed to do so.

32. That notwithstanding, the respondent did admit in her testimony that she did not have a helmet when the accident occurred though she knew that the same was necessary. In my view, the extent of injuries would have been mitigated had the respondent/plaintiff had protective gears. It therefore follows that

she was partly to blame for the injuries that she sustained. She ought to have taken measures to protect herself by donning the helmet. That she was on board the suit motor cycle with her child, a two year, three months old child going by the birth certificate produced in the other suit that is part of this series which showed that the child was born on the 28th September 2018 and was thus roughly 2 years and 3 months old at the time of accident. It is reasonable for a mother to travel on a motorcycle with a toddler especially one of that young age.

33. Accordingly, I find and hold that the respondent bore some liability for the accident though not as much as the appellant who was driving a much larger machine that was more dangerous than the motor cycle on which the respondent had boarded. In short, the respondent had failed to reasonably protect herself from foreseeable harm.

34. For the above reasons alone, I apportion liability between the appellant and the respondent at 80% and the respondent at 20%.

35. The trial court's finding on liability is thus set aside and substituted as set out herein above.

Quantum

36. The appellant submitted that the award on quantum to the respondent was inordinately high considering the injuries sustained by the respondent and past comparable awards and that this court ought to reduce the same to Kshs. 150,000. The appellant further submitted that the respondent only suffered soft tissue injuries and there was no evidence produced of the alleged fracture.

37. In in Butt v Khan [1982-88] KAR 1 it was held -

> " An appellate court will not disturb an award for damages unless it is 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".

38. I have considered the submissions tendered together with the authorities cited by the parties.

Damages

39. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see Tayab v Kinanu [1983] KLR 114 and West (H) & Son Ltd v Shephard [1964] AC 326, 345).

40. The respondent pleaded that she sustained the following injuries:

    Head injury with and cut wounds

    Injury to the chest

    Injury to the back

    Injury to the right shoulder with bruises

    Injury to the elbow with fracture

Injury to the right hand with cut wounds

Injury to the right wrist joint

Injury to the right leg knee with swelling

41. The said injuries were substantiated in the X-ray report, treatment notes, medical reports and P3 form all adduced by the respondent as exhibits 1 – 5 respectively. Accordingly, there was evidence to substantiate the respondent's claim that in addition to the soft tissue injuries she had sustained a fracture on the right hand.

42. I have considered the authorities cited by both parties herein. I must say that those relied on by the respondent and quoted in her submissions in no way relate to the facts of this case or the injuries sustained by the respondent whereas those relied on by the appellant are simply not comparable to those injuries sustained by the respondent.

43. In the case of Nguku Joseph & another v Gerald Kihiu Maina [2020] eKLR , the plaintiff was awarded Kshs 500,000 after sustaining soft tissue injuries and a fracture of the right humerus. I thus find no reason to interfere with the trial court's award of general damages of Kshs. 500,000 and do proceed to uphold the same.

44. The upshot of the above is that I find that this appeal is partially successful as far as liability is concerned. The appeal against quantum fails and is dismissed. However, the award of Kshs 500,000 general damages shall be subjected to 20% contribution as well as the costs awarded in the lower court. Special damages remain undisturbed.

45. On who should bear costs of this appeal, as the appeal is only partially successful, I order that each party shall bear their own costs of the appeal.

46. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE