Opiyo & another v Diang'a (Civil Appeal E021 of 2022)
[2023] KEHC 273 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEHC 273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E021 OF 2022

KW KIARIE, J

JANUARY 23, 2023

BETWEEN

VINCENT ACHOLA OPIYO ..... 1ST APPELLANT

GEORGE OUMA ONYANGO ..... 2ND APPELLANT

AND

GEORGE OPIYO DIANG'A ..... RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. E007 of 2020 by Hon. Tom Mark Olando–Principal Magistrate)

JUDGMENT

1. Vincent Achola Opiyo and George Ouma Onyango, the appellants herein, were defendants in Homa Bay Chief Magistrate's CMCC No E007 of 2020. They had been sued for relief in general damages and special damages following a road traffic accident involving motor cycle KMFC 736V and motor vehicle registration number KCP 664Q Toyota Hiace. The respondent was a rider of motor cycle registration number KMFC 736V. The motor vehicle registration number KCP 664Q hit the motor cycle he was riding and as a result of the accident he sustained injuries. The appellants were held 100% liable and the respondent was awarded Kshs 800, 000/= general damages.

2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Kimondo Gachoka & Company Advocates. They raised the following grounds of appeal:

    a. The learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants' submissions on both points of law and facts.

    b. That the learned magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

c. The learned trial magistrate erred in law and fact in finding the appellant 100% liable in view of the evidence produced before the trial court and in particular that the respondent failed to prove his case on liability against the appellants.

d. The learned trial magistrate erred in law and fact in awarding the respondent Kshs 800,00/- as general damages hence arriving at a wrong finding as regards to the injuries sustained by the respondent.

e. The learned trial magistrate erred in law and fact by awarding the respondent an inordinately high quantum as damages in the circumstances of this case.

f. The learned magistrate erred in law and fact in awarding the respondent as sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the respondent.

g. The learned magistrate erred in fact and in law in failing to consider the appellants' submissions on quantum and liability and legal authorities relied upon in support thereof.

h. The learned magistrate erred in law and fact by overly relying on the respondent's submissions which were not relevant and without addressing his mind to the circumstances of the case.

i. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

3. The appeal was opposed by the respondent through the firm of Veronica Migai & Associates Advocates who contended that it lacked merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd [1965] EA 123*, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. It is trite law that no liability can be apportioned without fault. The Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258* stated that:

   There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

6. When the respondent testified before the trial magistrate, he contended that the motor vehicle that hit the motor cycle he was riding, left its lane and hit his motor cycle from the front. However, the evidence of corporal Nicholas Muthama (PW3) was that both vehicles were travelling towards the same direction. He added that investigations were at the time still on going. There was, therefore, no sufficient evidence to hold the appellants 100% liable. In *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 at 1476, Denning LJ (as he then was) observed inter alia as follows:-

   > " Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them....."

In the instant case, the learned trial magistrate erred to find the appellants 100% liable. I set aside the finding on liability and substitute it with a finding of 50:50 liability.

7. According to the medical report produced in the trial court, the respondent sustained the following injuries:

    a. Chest injuries;

    b. Multiple injuries on the trunk;

    c. Pain and swelling on the legs;

    d. Soft tissue injuries to the left thigh; and

    e. Fracture of the pelvic bone- open book fracture.

8. When he was re-examined by Doctor Jennifer Kahuthu, the injuries as first observed were confirmed. The disability resulting from the accident was assessed at 15%.

9. In the trial court, the respondent had proposed an award of Kshs 1.3 million whereas the appellants had proposed an award of Kshs 300, 000. Each party cited decided cases in support of their proposal. In order for a court in its appellate jurisdiction to interfere with the assessment of general damages, certain principles must be satisfied. The Court of Appeal in *Ali v Nyambu t/a Sisera Store* [1990] KLR 534 at page 538 quoted with approval the principles laid down by the *Privy Council in Nance v British Columbia Electric Railways Co Ltd [1951]AC 601 at page 613* where it held that:

> The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (*Flint v Lovell [1935] 1KB 354*) approved by the House of Lords in *Davis v Powell Duffryn Associated Collievers Ltd [1941]AC 601*.

10. In the instant case after considering the decided case that injuries are almost similar to those suffered by the respondent and the awards therein, I find that I am not persuaded to interfere with the award of the learned trial magistrate.

11. Since the appeal has succeeded on liability, the appellants will have half the costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JANUARY, 2023.

KIARIE WAWERU KIARIE

JUDGE