2NK Sacco Drivers Self Help Group & 2 others v Kabiro & another (Civil Appeal E029 of 2021) [2023] KEHC 1521 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1521 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E029 OF 2021

DKN MAGARE, J

FEBRUARY 24, 2023

BETWEEN

2NK SACCO DRIVERS SELF HELP GROUP ..... 1ST APPELLANT

MAINA CHARLES ..... 2ND APPELLANT

JAMES RITHO MWANGI ..... 3RD APPELLANT

AND

STEPHEN MURUNGI KABIRO ..... 1ST RESPONDENT

JOSEPH MAIYO ..... 2ND RESPONDENT

JUDGMENT

Background And Pleadings

1. The 1st Respondent filed suit against the Appellants on 11/5/2015 in Molo CMCC 122 OF 2015 claiming damages for an accident involving motor vehicle registration KBU 096 P. According to the 1st Respondent, the accident was self-involving. HOWEVER, according to the Appellants the accident involved 2 vehicles.

2. The Appellants filed defence, denied liability and blamed motor Vehicle Registration Number KBM 629 Y and the 1st Respondent.

3. ON 7/7/2016, the Appellants were given leave by consent to "enjoin" a third party. I presume that by enjoin, the court meant joinder. There are no other proceedings involving the Third Party.

4. The 1st Respondent was heard on 2/10/2018 while his sole witness was heard on 21/1/2020. All medical documents marked for identification were produced by consent on 20/11/2018. The 1st Respondent closed his case on 3/3/2020.

5. The matter was listed for defence hearing on 14/4/2020. The Appellants' two witnesses being a police officer and the 3rd Appellants were heard on 6/10/2020 after an adjournment. The Appellants then closed their case and prayed for a date for written submissions.

6. After some false starts the trial court delivered its reasoned judgment on 9/3/2021. The judgment was to the following terms: -

    a. 100% liability against the Appellants jointly and severally.

    b. General damages of 1,000,000/=

    c. Special damages of 2,000/=

7. The delivery of Judgment is what triggered this appeal. Filed on 17/3/2021. The memorandum of Appeal has a whopping 9 grounds basically on 3 points

    a. The court erred in failing to make a proper finding on liability

    b. The court erred in awarding damages that were excessive and not justified in the circumstances hence arrived at an award that was excessive in the circumstances

    c. The court erred in over-relying on the 1st Respondent's submissions and ignoring the appellants' submissions

8. The most curious thing about these proceedings is that the case against the Third party case was not prosecuted. Third party directions were given on 22/10/2019 after the close of the Plaintiff's case. This was without ascertaining service on the third Party. The Third Party did not enter appearance and or filed defence and for a good reason. He was never served, otherwise an affidavit of service could have been filed and the court alerted to find sufficient service.

Duty of the court

9. The fist duty of the court is set out in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123 as doth: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of Fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."

10. Secondly, as regards quantum of damages the duty was elucidated in the case of Shah Vs Mbogo & Another Version Shah (1968) EA 93, by the former court of Appeal for Eastern Africa as doth;-

> " The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

11. It is my considered view that from several cases decided, the court should bear in mind, the state of the Kenyan economy and the people generally and the welfare of the insured and insured public in awarding damages. The damages are not meant to restore the frame of the body battered by the accident but to compensate for the damage caused.

12. Damages should not be so high that they affect premiums payable by the insured public or so low as to encourage impunity on part of drivers and leave the insured public unprotected.

13. At paragraph 18 of the decision in Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows: -

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. The setting aside of damages requires the court to have cognisance of the discretionary nature of damages. If the court below exercised its discretion judiciously, then this court should not substitute the same with its own discretion. However, if discretion was exercised arbitrarily and capriciously then the Appellate court ought to set aside the award. This is also for the case, where the award is generally untenable and does not flow from the evidence on record. It is not enough that the award is low or high. It must be so low or so high as to amount to an erroneous assessment of damages.

15. In Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 the court stated as doth: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

16. In Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

Liability

17. The Appellants who was the Defendant in the lower court was found 100% liable for the accident. The court held the defendant liable for the accident due to his pleadings. I have my reservations on the reasoning, although I will still reach on the same conclusion as regards liability as the court below. The court below erred in the reasoning but arrived at a correct conclusion.

18. The Appellants had 6 particulars of negligence. 4 of them were in the defence and 2 in the third party notice. From the pleadings, the court could determine negligence of the third party. However, the court is barred from doing so in the circumstances of this case. The plaintiff testified on 2/10/2018 that this was a self-involving accident.

19. The 1st Respondent was cross examined by the defendant. At that point, the suit was between the Plaintiff and the Defendant. On 20/11/2018, parties recorded a consent admitting documents that had been marked for identification.

20. It was till 15/7/2019 that the Appellants filed an application dated 15/7/2019. The application sought, inter alia, the following prayers: -

    c) The court be pleased to set aside proceedings and all consequential orders herein and the matter to be heard de novo.

21. The said application was on the grounds that there was a third party in the case and has not been captured at all.

22. That application was compromised by consent between the plaintiff and the defendant on 22/10/2019 as follows:-

    a. The matter proceeds from where the previous court reached.

    b. The third party direction be issued that liability between the defendant and 3rd party and between the plaintiff and defendant at the same time(sic)

    c. Costs of application be in the cause.

23. All subsequent hearings were between the defendant and the plaintiff. On 6/10/2020 Mr Musili closed the defence case and asked for submissions.

24. The third party case was not dealt with. It was neither started nor closed. The parties proceeded as if the third party was not party to the case. He was not served or at least an affidavit of service be filed with the court approving service. I have perused the entire primary file and only affidavit of service available relate to the Appellants or 1st Respondent

25. It is my humble view that Proceedings against the Third Party were not concluded all by way of directions, where they are served for such directions and service confirmed by the trial court. Without participation of the third party, it is doubtful if the court could find liability against them.

26. The Third Party does not appear to have been served at all. In the entire proceedings, at no point was the court satisfied that the Third Party was properly served or at all. The third party is not even indicated in the Coram as absent in any of the attendances in court.

27. Consequently, the Third Party has never been party to the suit in a manner of speaking. It is important to recall that Order 1 rule 17 of the Civil Procedure Rules provides as doth: -

    " 17. Default of appearance by third party.

    If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the third party) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice: Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for

leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit."

28. Therefore, for Order 1 Rule 17 to apply, service is crucial. Without service, a person cannot be said to be a party. A party cannot conduct a hearing in the absence of other parties and intend to succeed.

29. Further a consent is in nature of a contract. It only binds parties to it. The defendant and the Plaintiff purported to enter into a consent binding upon the Third party. My understanding is that upon being made a party, the remaining parties have no authority to record a consent without concurrence of the Third Party. All the consents including admission of documents, the case starting from where it reached and compromising an application did not involve the third party. He cannot be liable to eat the poised apples.

30. In Ransa Company Ltd v Manca Francesco & 2 others [2015] eKLR, the court of Appeal had these to say, in a matter where parties proceed against a party named in a suit without involving the said party: -

> " In my view, it was un procedural, irregular and unlawful to exclude the Appellantsdwho was named as an interested party in the Judicial Review proceedings as a party to the consent. The Appellantsdhad filed a lengthy replying affidavit in opposition of the orders sought by the ex parte applicant. The judge overlooked the fact that no consent can possibly be entered into by a claimant as happened in the instant case which purports to take away the rights of a defendant without his knowledge, concurrence or hearing. The consent order had the effect of revoking the Appellantss' title and ownership of the property the subject matter of the litigation without giving the parties a hearing or without first obtaining the express authority of the Appellantsdor that of his advocate. See the case of Kasmit Wesonga Ongoma & Another Vs. Wanga [1987] eKLR , this Court differently constituted said:-
>
> "A consent judgment is a judgment the terms of which settled and agreed to by the parties to the action."
>
> In the premises, the consent order did not include the Appellants, and in my view the whole process of how it was entered smacks of collusion or fraud which distinguishes this case from that of;- Flora Wasike vs. Desmond Wambeolla [1980] I KAR where it was held that a consent judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out."

31. Further proper directions need to be given as to the trial between between the defendant and the Third Party and the plaintiff and Defendant. The plaintiff and Defendant cannot bind a Third Party. Without compliance as aforesaid, the case against the Third Party cannot be sustained.

32. The court of appeal casr of Jessie Mwangi Gachago Versus Attorney General(1981) eKLR, gave the following directions over 41 years ago.

> " I can see no reason whatsoever for debarring the Appellants in this case from defending the third party proceedings, especially as the defendant's liability in the principal suit brought against him by the plaintiff still has not been established. Order I rule 17 seems to indicate that judgment against a third party should not be entered, even as against a third party who has not entered an appearance, until the defendant's liability to the plaintiff in the main suit has been established."

33. Simply put, the Appellants did not prosecute the case against a Third Party. Having failed to do so, this court cannot condemn the third party unheard.

34. In Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR The court stated

> 59. Whereas the authority concerned may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural impropriety the same cannot stand. It was therefore held in Onyango Oloo vs. Attorney General [1986-1989] EA 456:
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> "A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the Appellants and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

35. This therefore means, even though, on paper the Third Party was joined to the proceedings, he was never informed of the proceeding and or served for hearing. Having failed to prosecute the case against the third party, this court is precluded from determining issues of liability between the defendants and the third party. Therefore, this court cannot apportion liability between the Appellants and the 2nd respondent. This is in fact exampled by the Appellants herein closing the defence case without requesting the court to deal with the Third Party Case.

36. There is also no reason to apportion liability between the Appellants and the 1st Respondents

37. The court was therefore right, albeit on different reasons, in finding the Appellants 100% liable.

38. In conclusion thereof, this court finds that an appeal on liability is totally unmerited. The Appellants failed to pursue an application which could have set the record straight and equally serve the third party. The appeal on liability is therefore dismissed with costs.

Quantum

39. The First Respondent suffered several soft tissue injuries and the following: -

    a. Sustained a Ruptured bladder

    b. Sustained fractures of the superior and inferior pubic rami

    c. Sustained a separation of the pubic symphysis

40. Dr S I Aluda in his detailed report dated 5/2/2015 confirmed the existence of the said injuries. The First Respondent was treated, laparotomy was done and the raptured bladder repaired. X-ray showed fractures of the left superior and inferior public rami. All wounds were stitched and dressed. as at 5/2/2014 the injuries had healed save for occasional pain. the scars remained permanent features in the body.

41. The report was admitted by consent. There was no cross examination on the nature of the injuries. There was also no rival medical report. The best way to discredit expert report is through another expert. I therefore have no reason to disbelieve Dr S I Aluda. It is on the basis of the injuries and medical report that the court awarded Ksh.1, 000, 000/=.

42. Parties relied on authorities which had one or the other injury but not both the rapture of the bladder and fractures of the pelvis.

43. In the case of Mutinda Mutheka versus Gulamu Yusuf, an award of Ksh 1,000,000/ = was made for rapture of the urethra, fracture od tibia right leg and wound in the pelvic area. These injuries were less severe than the ones suffered by the 1st respondent herein.

44. In Barnabas v Ombati (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment), the Claimant head and chest contusion, bruises on his right hand and waist and fracture of the right femur, fracture of right humerus and fracture of the pelvic. In finding an award of 800,000 sufficient, justice R E Ougo stated as doth:-

> "I do not find that an award of Kshs 800,000/- awarded by the trial magistrate as excessive warranting interference by this court. The Appellant has also failed to show that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect."

45. . The court considered the cases of Peter Gakere Ndiangui v Sarah Wangari Maina [2021] eKLR. The court made an award of Kshs 500,000/- for a claimant who sustained pelvic fracture, soft tissue injury to the right thigh and chest.

46. In Daneva Heavy Trucks & another vChrispineOtieno[2022]eKLR the claimant was awarded Kshs 800,000/= for a fracture of the pelvis and fracture of tibia. Further, in reducing an award from 1,700,000/= to Ksh. 750, 000/=, Justice D S Majanja in Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR has this to say in a judgment delivered on 6.1.2018 stated as doth:-

> "12. The High Court has decided several cases where the plaintiff has sustained a fracture of the pelvis. In Muthamiah Isaac v Leah Wangui Kanyingi NRB HCCA No. 653 of 2011 [2016] eKLR, the plaintiff sustained a fracture of the right superior and inferior pubic ramii and blunt injury to the left leg. The court awarded Kshs. 400,000/- as general damages in 2015. ...

In Ali Malik Brothers Motor (K) Limited and Another v Emmanuel Oduor Onyango NRB HCCA No. 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs. 700,000/- which was affirmed by the High Court.

13. ...The Respondent sustained pelvic fractures and soft tissue injuries. Although he did not assess any disability, his concern was that the respondent would continue to suffer pain in future. Taking all this into account the decisions cited, the rate of inflation and other imponderables, I would award the respondent Kshs. 750,000/-."

47. In this case, the claimant suffered not only the fractures of the superior and inferior pubic rami of the pelvic but other serious injuries, that is, sustained a Raptured bladder, and a separation of the pubic symphysis.

48. fractures. Considering the extent of the injuries and the continuing pain and similar injuries suffered by the claimant an award of 1,000,000/= though high, it is not inordinately high as to amount to an erroneous estimate of damages.

49. I will also adopt a quote by justice Ngaah in Penina Waithira Kaburu v LP NYR HCCA 59 of 2016 [2019] eKLR , which has been quoted by several judges with approval as follows: -

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

50. Damages are discretionary and as such, setting aside damages need to be done in a similar manner for setting aside discretion. The test was concretised by the former Court of Appeal for East Africa in Shah Vs Mbogo & Another Version Shah (1968) EA 93, where they posited as follows:--

> " The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

51. I do not find the exercise of discretion to be capricious or arbitrary. The court considered applicable authorities on the record and the circumstances of the particular case.

52. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR justice D S Majanja was of the view that-

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

53. It is not enough that if I had been sitting as the trial court I will have given a different figure. This court cannot substitute the discretion of the lower court with its discretion. I note that the court considered correct principles in arriving at the award.

54. In the circumstances an appeal on quantum cannot succeed and the Appeal is accordingly dismissed with costs.

Determination

55. The court therefore makes the following orders: -

    a. The Appeal on liability and quantum is unmeritorious and is dismissed *in limine* with costs of Kshs 90,000/=.

    b. The costs be paid to the Respondent within 30 days, in default execution do issue.

DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 24TH DAY OF FEBRUARY THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

NA for the Appellantsd

N/A for the Respondent

Court Assistant, Andrew Mwambanga /Daniel